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AN EDITORIAL

DELEGATES from forty-five governments, and observers representing private international organizations accredited to the United Nations, completed three weeks of deliberations on June 10 at the UN Conference on International Commercial Arbitration. Before adjourning they adopted two basic documents: a Convention on Recognition and Enforcement of Foreign Arbitral Awards, and a Resolution putting the Conference on record in favor of "other possible measures for increasing the effectiveness of arbitration in the settling of private law disputes." The texts of the Convention and of the Resolution appear elsewhere in this issue of *The Arbitration Journal.*

Many differences of approach were evident at the Conference, a consequence of the wide variety of arbitration experience the delegates brought with them to the gathering. Nevertheless, the final version of the Convention was endorsed by thirty-nine delegations, with six abstaining more for reasons of internal political structure than due to disagreement on matters of substance. The degree of unanimity achieved was all the more impressive in that the Convention was not by any means a watered-down, innocuous statement. On the contrary, as Ambassador C. W. A. Schurman of the Netherlands, President of the Conference, said, the Convention marks "a step forward in that long march toward recognition and enforcement of the rule of law." He added that in all essential respects the document went much further than prior international agreements in ensuring that private agreements to arbitrate will be fully respected by the courts of all countries that become parties to it. In other words, the Convention deals directly with the primary problem of permitting the party winning an arbitral award to obtain satisfaction regardless of the place of arbitration, of the nationality of the arbitrators and, generally, of the domestic arbitration statutes prevailing at the place where the arbitration was held. Thus, the autonomy of the will of the parties is given decisive weight, when they adopted proper procedures for the settlement of their disputes.

Removal of legal obstacles now standing in the way of international trade arbitration is an important pre-condition for expansion

of arbitration practice. But it will not by itself bring about that practice. Still necessary is the preliminary educational and organizational work—promoting arbitration clauses, organizing machinery for impartial administration and maintenance of panels of arbitrators in all countries where arbitration may be necessary. It was to encourage these "other possible measures" that the UN Conference adopted a Resolution calling for "wider diffusion of information on arbitration laws, practices and facilities . . . establishment of new arbitration facilities and improvement of existing facilities . . . technical assistance in the development of effective arbitral legislation and institutions . . . regional study groups . . . [and] attention to model arbitration statutes." It may well be that, in the long run, this Resolution will have a greater impact than the Convention itself.

The Resolution recognizes that there is no single road to the common goal of international trade arbitration, but a number of avenues which should be explored simultaneously. In this respect, the attitude of the United States delegation was revealing. On the second day of the Conference, the head of the U. S. delegation, Wilson T. M. Beale, Jr., Deputy Assistant Secretary of State for Economic Affairs, pointed out that this was the first major conference on commercial arbitration to be attended by the United States. The U. S. Government did so, he said, because it "is well aware of the need for improvements in both law and practice, if arbitration is to realize its potential as a means of settling disputes in foreign trade . . . In its study of arbitration law and practice in the United States and throughout the world, the United States has been particularly impressed by the value of the pragmatic approach. In its view there appears to be much promise in encouraging such practical measures as improving arbitration facilities, standardizing arbitration clauses, developing more effective rules of procedure, and encouraging the uniform law movement. Private arbitration organizations already have done much along these lines locally and nationally. They have also taken useful steps in the international field. It is hoped that this Conference will mark the occasion for further progress in this direction."

This program will be achieved by the cooperation of private agencies most interested in the promotion of foreign trade arbitration. The coordination of these efforts will be greatly facilitated through the initial steps taken by the Conference as well as through personal contacts established in committees and working groups of the Conference.

WEIGHING THE EVIDENCE

A Re-enactment of a Commercial Arbitration Hearing

EDITOR'S NOTE: *The following is the text of a practice arbitration of a commercial case taken from the files of the American Arbitration Association. We believe it will be useful to schools of law and business administration in training students to apply modern techniques of dispute settlement. It is also suitable for production at meetings of trade and bar associations and businessmen's groups. As the arbitrator's decision would depend largely on the effectiveness with which the case is presented, it was thought that the educational purposes would be served best by omitting the award rendered in the case on which this dramatization is based. All names, locations and some facts have been altered from the original to conceal the identity of the parties.*

Appearances: For Westover Park, Inc.
Arnold Higgins, attorney, Higgins & Doherty
Walter Stern, manager, Westover Park, Inc.
Patrick T. Murphy, guard at Westover Park Shopping Center
Appearances: For Fashion Frocks, Inc.
Thomas G. Porter, attorney, Rolland, Horne & Porter
Seymour W. Franklin, president, Fashion Frocks, Inc.
Arthur Perkins, manager and buyer, Fashion Frocks, Inc.

TRIBUNAL CLERK: Gentlemen, this is the arbitrator, Mr. Vincent F. Singleton, general manager of Federated Stores, Inc. Mr. Singleton, this is Arnold Higgins, representing Westover Park, Inc., and this is Thomas G. Porter, representing Fashion Frocks, Inc.

ARBITRATOR, HIGGINS, PORTER } (*shaking hands*) How do you do? Very glad to meet you, etc.

HIGGINS: Mr. Arbitrator, I'd like you to meet my client, Walter Stern, manager of Westover Park, Inc.,

(*ARBITRATOR and STERN shake hands and murmur greetings, as above*)

and this is Patrick T. Murphy, special guard at Westover Park.

(*exchange of formal greetings, same as above*)

PORTER: Mr. Arbitrator, I would like to introduce my client, Seymour W. Franklin, president of Fashion Frocks, and Mr. Arthur Perkins, manager and buyer for the store.

(*Exchange of handshakes and greetings as above*)

ARBITRATOR: I assume you gentlemen on opposite sides of the table know each other and need no introduction.

(*Several nod assent and murmur* "Oh, yes," "Sure," *etc.*)

Then I will ask the clerk to proceed.

TRIBUNAL CLERK: Mr. Arbitrator, will you rise and take the arbitrator's oath?

(*Both rise and raise right hands*)

Do you solemnly swear that you will faithfully and fairly hear and examine the matters in controversy, and that you will make a just award according to the best of your understanding?

ARBITRATOR: I do.

TRIBUNAL CLERK: This proceeding is under the Commercial Arbitration Rules of the American Arbitration Association. Arbitration was initiated in accordance with the arbitration clause in a lease agreement dated February 16, 1957. The clause reads:

> "Any controversy or claim arising out of or relating to this lease, or any breach thereof, shall be settled in accordance with the Rules of the American Arbitration Association, and judgment upon the award may be entered in any Court having jurisdiction thereof."

The arbitration was initiated by a Demand for Arbitration dated March 14, 1958. The Demand reads:

> "Fashion Frocks, by its course of conduct in February, 1958, breached the lease agreement dated February 16, 1957. We ask for termination of that lease."

In reply to this Demand for Arbitration, Fashion Frocks answered:

> "We have your Demand for Arbitration dated March 14, 1958. We deny that we have in any way violated the lease agreement between us, and dispute your right to seek a termination."

ARBITRATOR: Well, gentlemen, since Westover Park is the claimant in this action, I suggest we proceed with its case first. As this case is being heard in April, only a month after the demand for arbitration and less than two months after the events occurred, I assume that all witnesses' recollections will be fresh.

HIGGINS: Mr. Arbitrator, I believe I can simplify these pro-

ceedings by making a brief opening statement before introducing witnesses. On February 16, 1957, after several weeks of negotiation, I concluded, on behalf of my client, an agreement for Westover Park, Inc. with Fashion Frocks, Inc. By this agreement the latter was to operate a fashionable women's specialty shop in the shopping center known as Westover Park, Inc. The lease will be placed in evidence, but it will suffice for an opening statement to point out that Westover Park is a suburban retail development in an upper middle class neighborhood. So concerned was my client about maintaining the high standards of this development that we included a special provision in the lease requiring the tenant to maintain—and I quote—"the highest standards of merchandising, display and advertising" as a condition for continuing the tenant-landlord relationship. The contract also gives the landlord the right to terminate that lease on 60 days' notice in case of a breach of the agreement by the tenant.

We will show that after having observed the terms for about a year, Fashion Frocks suddenly committed a deliberate violation in running a bargain-basement type of sale and advertising it in a manner calculated to create just the kind of atmosphere we wanted to avoid. When the breach was pointed out, far from agreeing to a correction, Fashion Frocks, through its manager, Mr. Arthur Perkins, refused to admit that the new course of conduct was a violation of the agreement. In short, he said it was his intention to continue that course. My client thereupon had no alternative but to give the tenant 60 days' notice to vacate the premises. This we did on March 1st. Inasmuch as the tenant denied we had just cause for our action, we followed it up with a Demand for Arbitration, which brought this tribunal into being. I would like to call to the witness stand my client, Mr. Walter Stern.

ARBITRATOR: Before you do, I think we ought to have an equally brief opening statement by Mr. Porter, if he cares to make one.

PORTER: I do. Thank you very much. Mr. Arbitrator, a little more than a year ago, as you have been told, a lease was drafted and signed which gives my client, Fashion Frocks, Inc., the right to operate a women's specialty shop in the Westover Park shopping center for a period of 10 years. The lease is a complicated document, but most of its provisions are not in dispute. Our premises are identified, a rental is stipulated, services to be performed by the landlord are itemized, and all the other usual provisions are contained. The only

matters that we are in dispute about revolve, as Mr. Higgins has said, around Article 21, which describes the type of store we are to operate, and Article 40, which sets forth procedure for termination of the lease when either party thinks the other is in substantial violation.

For a year, Fashion Frocks conducted its business without interference from the landlord. Garments were bought, advertised and sold. Several times during the year special sales were announced to clear the racks of unsold dresses, suits and coats in preparation for the next season. In general, business has been somewhat disappointing. I am sure you are aware, Mr. Arbitrator, of the economic recession we are now suffering. In the women's apparel field it has been especially bad, made more so by the fact that we are a new store in a new suburban development. And so, in the course of regular business affairs, Mr. Franklin decided that in order to clear the racks for the spring season, a special sale was necessary. Because Washington's Birthday sales are something of a national institution in stores, we decided to have one and advertise it in the Boston papers. It wasn't much different from other sales except that this time the response was better than we expected and we weren't prepared with enough sales help and guards to keep order. As a result, there was a small amount of disorder and a bit of bad publicity. But out of that molehill, Westover Park tried to make a mountain. Pretending we had broken the lease—which we hadn't—they gave us 60 days' notice to get out. We disputed their right to do so and now we are in an arbitration to decide who is right. My witnesses will prove all the facts. All I want to say in this introduction is that Fashion Frocks' sale on Washington's Birthday was incidental to the regular operation, and was specifically in accordance with our lease.

ARBITRATOR: Now, Mr. Higgins, you may proceed with your witnesses.

HIGGINS: I call Mr. Walter Stern.

(*STERN takes the stand and is sworn*)

TRIBUNAL CLERK: Do you solemnly swear that the evidence you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

STERN: I do.

HIGGINS: For the record, please state your name, address and official position with Westover Park, Inc.

STERN: Walter Stern, 1400 Bay Boulevard, Cambridge, Mass. I am manager of Westover Park, Inc.

HIGGINS: Mr. Stern, I hand you a copy of a document. Will you please identify it?

STERN: This is a ten-year lease, dated February 16, 1957, with Fashion Frocks, Inc

HIGGINS: I introduce this in the record as an exhibit.

(The document is shown to PORTER, attorney for Fashion Frocks. The ARBITRATOR asks if there is any objection. There being none, he directs the CLERK to record it as Westover Park's Exhibit No. 1.)

HIGGINS: Mr. Stern, will you please tell the arbitrator, in your own words, what kind of a development Westover Park is and what sort of store the lease calls for?

STERN: Well, we bought this 60-acre area in a very fashionable neighborhood, and after a lot of negotiation with local officials, and all that, we got permission to establish a number of retail stores. We planned this as a very exclusive development, permitting only a certain number of competing stores to operate and only the kind of advertising that would retain this character.

HIGGINS: More specifically, Mr. Stern, what provisions did you make to guarantee the type of retail development you are describing?

STERN: Well, we required all leases to include a provision which, in the lease I just identified, is known as Article 21.

HIGGINS: I now hand you a copy of this lease. For the benefit of the Arbitrator, will you please read Article 21?

STERN (*reading*): "The Tenant understands that the shopping center wherein the premises are located has been developed and maintained as a location for good quality merchandising and the Tenant warrants and covenants and agrees that the business he will conduct on the premises will be in conformity with the highest standards of merchandising, display and advertising. The Tenant further warrants and agrees that no special sale or auction will be carried on the premises except as incidental to the normal routine of the Tenant's business."

HIGGINS: Now, Mr. Stern, will you please tell the arbitrator in your own words what happened in February 1958?

STERN: Well, the first thing I knew, on February 21st all the Boston papers carried big ads announcing a Washington's Birthday sale at Fashion Frocks. I have copies of that advertisement here. They

advertised women's tailored suits for as little as $25.00. The next day a mob of about 300 women descended on . . .

PORTER: One moment, please. I object to the witness' conclusion. Let him just state the facts. I think we can let the arbitrator decide whether there was a "mob" and, if so, what that had to do with the case.

ARBITRATOR: I agree with Mr. Porter. Mr. Stern, just confine yourself to facts and leave it to Mr. Higgins to show conclusions later.

STERN (*continuing*): Well, as I was saying, about 300 women answered the ad. The police couldn't handle the traffic; plate glass windows were broken in the crush. A few of the women fainted and it was a shambles. This was all written up in the papers the next day.

HIGGINS: Before you proceed, Mr. Stern, let's get some of this documentation in the record. I now show you an advertisement from the *Boston Globe*. Is this the advertisement you refer to?

STERN: Yes, this is the ad that Fashion Frocks took and placed in the February 21st papers. This one was in the *Boston Globe*. It was the same in the *Boston Herald* and the *Advertiser*.

(Westover Park's Exhibit No. 2)
SPECIAL WASHINGTON'S BIRTHDAY SALE!
EVERYTHING MUST GO!

Women's Coats, Suits and Dresses, regularly priced $75 to $200, now slashed 40% or more. A few dresses selling for $12.00 each, a few tailored suits for $25.00!
All garments from our original stock!
Fashion Frocks, Inc., Westover Park Shopping Center
Store opens 10 a.m., February 22

HIGGINS: Now, Mr. Stern, you have told us about the disorder in the shopping area as a result of the February 22nd sale. I now hand you a front-page story from the *Boston Globe* dated February 23rd. Does this article describe what happened?

PORTER: Just a minute, Mr. Arbitrator. I object to testimony about something that hasn't been introduced or identified. Furthermore, a newspaper clipping has nothing to do with this case.

ARBITRATOR: That point is well taken. I suggest, Mr. Higgins, that if you would like your witness to talk about the newspaper article you first identify it for the record.

HIGGINS: I was about to do so and will be glad to do it now. I just want Mr. Stern to identify it.

STERN: Yes, this is the story of the disorder at Westover Park around the Fashion Frocks store on February 22nd, and the picture shows the broken window at Fashion Frocks.

HIGGINS: I offer this clipping as an exhibit.

(*He hands the clipping to the TRIBUNAL CLERK who shows it to the ARBITRATOR.*)

ARBITRATOR: (*Offering the clipping to PORTER*) Have you any objection, Mr. Porter, to acceptance of this newspaper clipping as evidence?

PORTER: I certainly have. This clipping is not evidence at all of any breach of contract on the part of my client. If Mr. Higgins is trying to prove there was a sale and a large crowd, and that a window was broken, I have no objection, although I would be justified in raising one on technical hearsay grounds if this were a court proceeding. But that isn't pertinent to the issue.

HIGGINS: It is our contention that the riotous nature of that sale *does* prove that Fashion Frocks violated the lease. Naturally, opposing counsel doesn't want to admit that. But if he will concede that this newspaper story is an accurate account of the facts, perhaps we can put it in the record as a joint exhibit and leave it to the arbitrator to decide what it proves.

PORTER: While I have not raised the hearsay issue as such, we certainly will not accept that newspaper story as a factual account. Newspapers are interested in circulation. And circulation requires lurid headlines and sensationalism. Washington's Birthday, being a holiday, wasn't productive of much news, so an incident in the suburbs was blown up to unrecognizable proportions.

ARBITRATOR: I think I will allow the witness to identify the clipping and put it in the record for what it is—a newspaper story. What it proves, and how much bearing it has, will be considered by me after all the other evidence is in.

HIGGINS: Mr. Stern, will you please read the clipping?

STERN (*reading*):

"THREE HURT IN STORE RIOT

"An unruly crowd of 300 bargain-hunting women descended on a women's specialty store in fashionable Westover Park early yesterday morning in response to a 'Washington's Birth-

day Sale' announced by Fashion Frocks. Within an hour after the store opened its doors, three women had fainted, plate glass windows had been broken, and local police had put in a call to nearby law enforcement agencies for assistance. The injured, all of whom were released after being treated in the first aid room of the Westover Park Shopping Center, were: Mrs. Mary Watkins, 406 East Boylston St.; Miss Carmen Velez, 600 Jay Street; and Mrs. Hilda Sherman, 345 Norway St., all of Boston.

"The announcement that dresses and suits from the regular stock of Fashion Frocks would be sold for $12 to $25 brought customers to the store as early as 6 a.m., although normal store hours are from 10 a.m., when the sale was scheduled to begin. One of the few lucky customers was Miss Sophie Foreman, 866 Trapelo Road, Waltham, who bought a suit marked down from $150.00 to $25.00. Most of the women who could find anything they liked got more modest bargains.

"Although some bitterness was expressed by other retailers in the Westover Park development over Fashion Frocks' sale, the first of its kind in this neighborhood, there were others who profited by the overflow crowd. James T. Jameson, manager of the Golden Cup Tea Shoppe, reported a 300 percent increase in business to the foot-weary and mostly disappointed customers."

And then the caption under the picture reads:

"Part of the unruly crowd of 300 bargain-hunting women trying to get expensive dresses and suits for a nominal $12 to $25. The front window of Fashion Frocks was broken in the crush. No one was hurt by splintered glass, but three women who fainted had to be given first aid."

HIGGINS: Mr. Arbitrator, I offer this newspaper clipping in evidence.

ARBITRATOR: Any objection?

PORTER: I have stated my attitude to the newspaper story.

ARBITRATOR: Well, I will accept it for the time being and consider its relevance later.

HIGGINS: Now, Mr. Stern, what happened following the February 22nd occurrence?

STERN: Well, I can tell you that the first thing that happened was that other lease holders in the area began threatening to cancel their leases and to move out, accusing me of violating the plan for the development. And, of course, it wasn't my fault at all. I got in touch with Mr. Perkins and told him that I thought he

was in violation of the lease and that I didn't want a repetition, but he not only denied that he was in the wrong, but said it was his intention to continue that merchandising policy. Under the circumstances, all I could do was invoke the 60-day notice clause and tell him to get out.

HIGGINS: You said tenants were threatening to move. Have you any proof of that?

STERN: Well, mostly the threats were over the telephone, but I have one letter here from a shoe store just a few doors down from Fashion Frocks.

HIGGINS: Will you read that letter, please?

STERN: Yes sir. The letter is dated February 26, 1958 and it comes from Fred P. Gordon, manager of the Hilton Shoe Store, Inc. The text reads:

> "Dear Mr. Stern:
> I am sure you are aware of the scandalous disorder in front of the Fashion Frocks store last Saturday morning. This is to advise you that we regard your tolerance of Fashion Frocks' sales and advertising policy a breach of our lease agreement. When we agreed to maintain high standards of merchandising we were given to understand by you that all other tenants would do likewise. Surely you must know that our regular customers, as well as customers of other reputable stores, will be repelled by the kind of environment that has been created. We are compelled to serve notice that unless this situation is remedied we will consider ourselves no longer bound by the lease and will be forced to take appropriate legal action.
>
> Very truly yours,
> Fred P. Gordon,
> Manager"

HIGGINS: Mr. Arbitrator, I would like to offer this as an exhibit.

ARBITRATOR: (*handing the letter to PORTER*) Any comments, Mr. Porter?

PORTER: I have no objection to its admission, subject to cross-examination.

ARBITRATOR: (*handing the letter to the CLERK*) It will be marked as the next Westover Park exhibit.

HIGGINS: I have no further questions.

ARBITRATOR: Mr. Porter, would you like to cross-examine?

PORTER: Yes, thank you. On the subject of Article 21, Mr. Stern, you said that you have a similar clause with all your tenants, is that right?

STERN: Yes, that's right—substantially the same wording in all the leases.

PORTER: Do you dictate to all of your tenants what they will charge for their merchandise?

STERN: No, and I am not trying to dictate to Fashion Frocks either.

PORTER: Just answer my question, please.

STERN: No, I am not dictating prices, but general price levels and decorum are implied in Article 21.

PORTER: Have any of your other tenants conducted sales on their premises?

STERN: Oh yes, but not like this one.

PORTER: But in their sales they have simply reduced the price of certain of their merchandise and offered it to the public for sale. Is that right?

STERN: That's right.

PORTER: And you don't regard it as properly within your authority to determine how big a reduction they should offer?

STERN: I don't concern myself with that, provided they don't violate Article 21.

PORTER: On February 22nd did Fashion Frocks sell its regular line of merchandise, or did they bring in specially bought garments for the purposes of the sale?

STERN: I don't know anything about that.

PORTER: Well, have you any reason to believe that Fashion Frocks was selling anything but its regular line of merchandise?

STERN: I have no reason to believe one way or the other.

PORTER: You have told the arbitrator that after the February 22nd sale you spoke to my client and protested against his sale. Do you remember Mr. Perkins telling you that the sale consisted only of a markdown of merchandise he already had in the store?

STERN: Yes, I believe he said something like that.

PORTER: And you have no reason to disbelieve it, have you?

STERN: No, I don't have any proof about that.

PORTER: In other words, your whole complaint is that he sold his regular merchandise at lower prices than you would have wanted him to.

STERN: That's not it, exactly. It's the way he sold it and the atmosphere he created around the place.

PORTER: You have identified a newspaper story with a picture of a broken window. Is the window now replaced?

STERN: I believe it is.

PORTER: Who fixed it?

STERN: I suppose it was Fashion Frocks.

PORTER: In other words, the tenant didn't ask the landlord to fix it in this case, is that right?

STERN: That's right. I should hope not.

PORTER: Do you know whether the windows of any other stores were broken?

STERN: No.

PORTER: In other words, all the damage was done to Fashion Frocks. It would appear that no one is aggrieved except Fashion Frocks.

STERN: Well, the commotion certainly aggrieved everybody else.

PORTER: Now, you have told the arbitrator that other tenants called to complain. Do you know that some of the tenants benefited by the 300 new customers brought into the area?

STERN: No.

PORTER: You have introduced for purposes of identification a newspaper story about the sale. (*Turns to CLERK.*) May I have it? I will now read to you one sentence.

> "James T. Jameson, manager of the Golden Cup Tea Shoppe, reported a 300 percent increase in business to the footweary and mostly disappointed customers."

It would appear, then, Mr. Stern, that my client did some of your other tenants a real service in bringing all those customers to the area.

STERN: A few more services like that and we can all close up shop!

PORTER: Was Mr. Gordon of the Hilton Shoe Company one of the persons who telephoned you?

STERN: Yes, he was one.

PORTER: When was that, before or after he wrote the letter?

STERN: I believe it was before.

PORTER: And after telling you orally what he thought, he followed it up with a letter. Don't you think that was strange?

STERN: Not at all.

PORTER: Is it not a fact, Mr. Stern, that you suggested to Mr. Gordon that he write the letter?

STERN: No.

PORTER: Did you promise you would do anything about his complaint when he called you?

STERN: Yes, I said I would put a stop to Fashion Frocks' bargain basement sales.

PORTER: And you didn't hint that it would help you to do so if Mr. Gordon put his objections in writing?

STERN: No.

PORTER: Mr. Arbitrator, later on I may wish to ask Mr. Gordon to appear as a witness.

ARBITRATOR: That is your privilege.

PORTER: Is it not a fact that you want to get Fashion Frocks' store for someone else?

STERN: I certainly do, because they are not running the kind of store they are supposed to.

PORTER: Isn't it a fact that you are just using the incident of February 22nd as an excuse to get the store for someone else and that you want my client out no matter how he runs his business?

STERN: That's not true.

PORTER: I have no further questions.

ARBITRATOR: Mr. Higgins, have you any additional witnesses?

HIGGINS: Yes. I call to the stand Mr. Patrick T. Murphy.

(*MURPHY takes the stand. The TRIBUNAL CLERK administers the oath*)

TRIBUNAL CLERK: Do you solemnly swear that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

MURPHY: I do.

HIGGINS: For the record, will you please state your name and address, and your position with Westover Park.

MURPHY: Patrick T. Murphy. I live at 90 Crescent Drive, Boston. I'm a special guard at Westover Park.

HIGGINS: Were you on duty at Westover Park on the morning of February 22nd?

MURPHY: I was.

HIGGINS: Will you please tell the arbitrator in your own words what transpired around the Fashion Frocks store that morning?

MURPHY: Well, I came on duty at 8 a.m. as usual and right away I saw that something was doing. A few women were loitering around the store. The store always opens around 10 o'clock so I asked one of them what was doing. She told me there was going to be a sale, so I went about my business.

HIGGINS: What do you mean by "went about my business"?

MURPHY: Well, I have rounds to make. I punch a time clock at certain stations and I stopped off at the main office like I always do.

HIGGINS: What happened next?

MURPHY: Well, about nine o'clock someone put a rush call in to the office for help. They said there was a riot going on . . .

PORTER: Just a minute. If this witness has anything to contribute to this hearing let him testify to what he saw, not to what some unnamed person said over the telephone to some other unidentified person.

ARBITRATOR: I agree. Mr. Murphy, I suggest you testify to what you saw and did.

MURPHY: Well, as I was saying, I got a call to go running over to Fashion Frocks and I did. When I got there, I saw a mob of pushing, clawing women trying to get into the store or up near the door to be the first ones in.

PORTER: I object to witness' use of the word "mob." It is the witness' conclusion.

ARBITRATOR: Mr. Murphy, it would be better not to use words like that. Just tell us what happened.

MURPHY: I tried to calm them down. "Let's form a line," I said, but they wouldn't pay any attention to me. They kept pushing

and then I heard glass break. That started the women screaming more and one of them got thrown down, or maybe she fainted. I saw I couldn't do anything by myself, so I ran over to the office and got another guard to help me. We came back in our jeep. By that time the store was open and some of the women were inside, but three women passed out from the excitement or the crush or something. We helped them come to and took them to the first aid room in our jeep.

HIGGINS: Mr. Murphy, what experience have you as a guard or law enforcement officer?

MURPHY: Well, for thirty years I was on the Boston police force until I was retired. Then I was a bank guard for a little while and I finally took this job.

HIGGINS: From your experience as a policeman, how would you compare the riot of February 22nd with others you have had to cope with?

MURPHY: I never saw the like! The . . .

PORTER (*interrupting*): I object, Mr. Arbitrator! If Mr. Murphy is to answer that question, we would have to listen to a long and garrulous story about every incident he dealt with while pounding a beat. I don't see any need for it, nor do I think that asking loaded questions and calling the February 22nd incident a "riot" is called for. It is only counsel's conclusion.

HIGGINS: Well, I think my question was proper but rather than argue about it, I'll withdraw it. I have no further questions.

ARBITRATOR: Would you like to cross-examine, Mr. Porter?

PORTER: Indeed I would. Mr. Murphy, you don't seem to have been of much use to Westover Park or its tenants that morning, do you?

MURPHY: Well, I did all I could.

PORTER: That's the whole point. *Did* you do all you could? When you arrived at 6 a.m. and saw some customers around Fashion Frocks, did you then suggest that they line up in an orderly way?

MURPHY: No. How was I to know hundreds of them would show up?

PORTER: If you don't mind, I'll ask the questions. In other words, you just went about your routine business and took no precautions to prevent disorder at Fashion Frocks?

MURPHY: Well, I had my regular job to do. My beat is the whole shopping center, not just Fashion Frocks.

PORTER: I have no further questions for this witness.

ARBITRATOR: Before you leave the stand, Mr. Murphy, I would like a point of information. Did you have any advance notice that there might be special problems of keeping order on February 22nd?

MURPHY: No, sir.

ARBITRATOR: In other words, you just came to work that day like any other without having been prepared for a special situation?

MURPHY: That's right.

ARBITRATOR: Thank you. You may step down now. Mr. Higgins, have you any other witnesses?

HIGGINS: No.

ARBITRATOR: Mr. Porter, would you like to proceed with your case, then?

PORTER: Yes, thank you. I call as my first witness Mr. Seymour W. Franklin.

(*FRANKLIN is sworn in by the TRIBUNAL CLERK*)

TRIBUNAL CLERK: Do you solemnly swear that the evidence you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

FRANKLIN: I do.

PORTER: Mr. Franklin, will you please, for the record, tell us your name, your address, and your position?

FRANKLIN: Seymour W. Franklin. I am President of Fashion Frocks, Inc., and I live at 229 West Chambers Street, Cambridge, Massachusetts.

PORTER: Mr. Franklin, let's go back to the time this lease was negotiated. Will you tell us what your plans were?

FRANKLIN: When we signed this lease we intended to operate a quality store, and we still do, but the recession hit our business pretty hard in the last few months, and with a change of style, in preparation for the Spring season we had to clear our racks of unsold merchandise. So we decided to run this Washington's Birthday sale.

PORTER: Have you run any other sales since you have been operating at Westover Park?

FRANKLIN: Yes, we have had sales from time to time, but nothing as dramatic as this one.

PORTER: What merchandise did you sell in your February 22nd sale?

FRANKLIN: Just my regular line.

PORTER: In other words, you didn't buy up any distress merchandise from anybody else and sell it, is that right?

FRANKLIN: That's right, just my own regular merchandise.

PORTER: You have heard testimony about $25.00 suits and $12.00 dresses. Is that generally representative of the degree to which you cut prices?

FRANKLIN: No. Actually, there were only a few garments at those prices and my advertisement made that clear. Generally the mark-down was about 40 percent.

PORTER: Was it a successful sale?

FRANKLIN: Well—I didn't make any money, but I cleared my racks. I am ready for shipments now of my spring line, and I got rid of unsold inventory.

PORTER: Is it your plan to continue sales of this kind?

FRANKLIN: I might. As you know, Washington's Birthday sales are more or less of a national institution, and the best stores in the country practice that method of selling. I might have a similar sale next year. In any case, it would probably be a once-a-year event. But the real reason was that I had to do something drastic to stay in business after the bad months I had.

PORTER: I call your attention to Article 21, which has been introduced as evidence, and particularly to the phrase, "The Tenant further warrants and agrees that no special sale or auction will be carried on the premises except as incidental to the normal routine of the Tenant's business." Now, Mr. Franklin, you have said that you didn't buy up any distress merchandise, or bring in special additional garments for this sale.

FRANKLIN: That is correct.

PORTER: Would you say, then, that the sale you conducted was normal and incidental to your business?

FRANKLIN: Absolutely.

HIGGINS: I object. That is the issue for the arbitrator to decide. We don't want this witness' self-serving conclusions.

ARBITRATOR: We will take it for what it is worth. There is no jury here.

PORTER: Now, when you say you might run similar Washington's Birthday sales next year or the year after, do you mean they will be exactly the same?

FRANKLIN: No, not exactly. Now that we know what to expect, we can run more orderly sales. Naturally, in the future I'll alert the police and bus lines, etc., and also other stores in the Center to be prepared with extra sales people, and I'll take precautions for the comfort and welfare of our customers. I don't want windows broken or women fainting any more than Mr. Stern does.

PORTER: No further questions.

ARBITRATOR: Mr. Higgins, would you like to cross-examine?

HIGGINS: Mr. Franklin, you testified that when you signed the lease, it was your plan to operate a high quality store.

FRANKLIN: Yes.

HIGGINS: And you said further that you were hard hit by the recession and that your business has not been prosperous.

FRANKLIN: Well, all I said was that I had a bad season.

HIGGINS: And so you now have decided to operate a high quality store no longer, is that right?

FRANKLIN: No, I don't mean that at all. It's just that I had to clear out some unsold stock.

HIGGINS: And now, if my client here were so indifferent to his rights and to the rights of other tenants at Westover Park as to permit you to poison the . . .

PORTER (*interrupting*): Just a minute. Mr. Arbitrator, there will be time, I imagine, for summation and speeches, and I don't think that Mr. Higgins has any right to abuse. . . .

ARBITRATOR (*interrupting*): I think perhaps, Mr. Higgins, you should phrase your question more directly and leave arguments to a later time.

HIGGINS: All right. I will phrase it another way. Mr. Franklin, now that your racks have been cleared you are ready to receive spring merchandise. That was your testimony, wasn't it?

FRANKLIN: Yes.

HIGGINS: What sort of merchandise will that be?

FRANKLIN: The same kind I have always sold.

HIGGINS: More specifically, are you trying to tell the arbitrator that it is now your plan to sell exactly the same price range of merchandise that you sold heretofore?

FRANKLIN: Now wait a minute. I didn't say anything about price ranges. Prices are always going up and down in accordance with market conditions. Furthermore, styles change, and there is no comparability.

HIGGINS: When you negotiated this lease you agreed that Westover Park, and I am quoting from Article 21, "would be maintained as a location for good quality merchandising, and the Tenant warrants and covenants and agrees that the business he will conduct on the premises will be in conformity with the highest standards of merchandising, display and advertising." That is the end of the quotation, Mr. Franklin. Is it your contention that what you did was in conformity with the highest standards of merchandising, display and advertising?

FRANKLIN: Yes! As I said, all the best stores have once-a-year special sales.

HIGGINS: If the highest standards lead to mob scenes and broken windows, what would you say the lowest standards were?

FRANKLIN: Is that a question?

HIGGINS: You needn't answer. Mr. Franklin, you blamed the recession for your present predicament. Is the recession still on?

PORTER: I suggest that if Mr. Higgins wants a short course in economics, this arbitration hearing is not the proper place for it.

HIGGINS: My question is, if the economic circumstances should make it impossible for you to sell merchandise of a kind which our lease describes as good quality, is it your plan now to sell what the trade generally calls the popular line?

FRANKLIN: No. I have been selling only good quality and that's what I intend to sell in the future.

HIGGINS: No more questions.

(*FRANKLIN leaves the stand*)

PORTER: I would now like to call Mr. Perkins to the stand.

(*PERKINS walks to the witness stand and is sworn*)

TRIBUNAL CLERK: Do you solemnly swear that the evidence you are about to give will be the truth, the whole truth, and nothing

but the truth, so help you God?

PERKINS: I do.

PORTER: Please state your name, address and position with Fashion Frocks.

PERKINS: Arthur Perkins. 1010 Schofield Avenue, Boston. I am buyer and store manager at Fashion Frocks.

PORTER: Mr. Perkins, are you the person in charge of purchasing garments and of sales?

PERKINS: Yes. Of course, I discuss policies, styling and merchandising methods with Mr. Franklin, but I'm in charge of operations at the Westover Park store.

PORTER: Are you in a position to know what sort of garments are bought, what they sell for, and what orders you have placed for the coming season?

PERKINS: I am.

PORTER: You have heard testimony about dresses that sold for $12.00 on February 22nd and suits for $25.00. What are the facts?

PERKINS: Actually, there were only two of each. They were from our regular stock and marked down from $69.95 and $89.95, respectively, but they were not popular sizes and there was very little likelihood that they could ever be sold at anything near original prices, especially in view of the change of seasons and styles.

PORTER: On February 22nd, what was the extent of your markdown?

PERKINS: It varied. Most of the garments were reduced about 40 percent. A few were reduced a bit more and some a little less. On the average, it was 40 percent.

PORTER: Have you placed your orders for the spring season?

PERKINS: Oh yes, we did that months ago, before the sale. In fact, our new line is already on sale.

PORTER: Just to avoid confusion, when you say "on sale" you don't mean you are running another sale, do you?

PERKINS: Oh, no. I mean the garments are on the racks and customers are buying them at regular prices.

PORTER: What price line are you selling?

PERKINS: The same as before. Dresses start at about $60 and suits at about $85.

PORTER: Have you bought these new garments from the same manufacturers and wholesalers as the others?

PERKINS: The very same.

PORTER: Do you have any records of your sales on February 22nd?

PERKINS: Yes. I brought with me all the sales slips written up that day. Each of them shows the price the customer paid and the garment bought, by style and lot number.

PORTER: Mr. Arbitrator, I would like to offer them in evidence.

(*PORTER hands several books of sales slips to the ARBITRATOR, who passes them on to HIGGINS*)

ARBITRATOR: Mr. Higgins, have you any objection to acceptance of these sales slips in evidence?

HIGGINS: If you don't mind, I would like to glance through them for a moment. (*He looks through the books briefly.*) Mr. Arbitrator, these seem to be carbon copies of sales slips with numbers that don't mean anything. What are these books supposed to be evidence of?

PORTER: Mr. Perkins has testified that they represent all sales made on February 22nd. They prove that my client was selling only his regular merchandise.

ARBITRATOR: These sales slips would seem to show what prices were charged for certain garments that are identified only by style and lot numbers. How do the slips show when you bought them or the kind of merchandise?

PORTER: I was coming to that. We also have a ledger in which entries of style and lot numbers were made when garments were ordered and when they were delivered. By checking the sales slips against the books, one can easily see Fashion Frocks sold only their regular stock. I would like to ask Mr. Perkins to identify this ledger (*handing the ledger to PERKINS*).

PERKINS: Yes, this is the ledger we have been using from the beginning of our operation at Westover Park. It shows the orders and receipts of merchandise. This column (*pointing to a column of the page*) shows style and lot numbers.

(*PERKINS hands ledger back to PORTER, who passes it on to HIGGINS, via the ARBITRATOR, as before*)

HIGGINS: (*glancing at ledger briefly*) Well, as long as we have *all* the records, not just a few, we have no objection to their being received in evidence.

ARBITRATOR: (*handing the exhibits to the* ***TRIBUNAL CLERK***) The Clerk will mark this "Fashion Frocks Exhibit No. 1."

PORTER: Thank you, Mr. Perkins, that will be all.

ARBITRATOR: Mr. Higgins, you may cross-examine.

HIGGINS: Mr. Perkins, were you the man responsible for placing the ad in the newspapers about your February 22nd sale?

PERKINS: Yes, I was, after consultation with Mr. Franklin.

HIGGINS: You testified that only two dresses and two suits were sold at the very low prices of $12 and $25. Do you think it was fair to lure hundreds into the area with your advertisement if that's all you planned to do?

PORTER: Now just a minute. We are not interested in Mr. Higgins' advice on how to write advertising copy. The issue in this case is not the advertising policy of Fashion Frocks, but whether Fashion Frocks is selling the line of garments they undertook to sell in the lease.

HIGGINS: It's not as simple as that. Article 21 of the lease specifically refers to advertising policies.

ARBITRATOR: (*Looking at the lease*) I'll allow that question. You may answer, Mr. Perkins.

PERKINS: Would you repeat the question, please?

HIGGINS: In view of the fact that you marked down only a few garments to those low figures, I asked whether you thought the ad you put in the papers was honest.

PERKINS: It was honest. The ad says "a few" were going at that price.

HIGGINS: But you were speculating that large numbers of women would come running to the store for the big bargain, each hoping to be one of the few?

PERKINS: No. In fact, if we expected what actually happened, we would have been prepared with more help and some guards.

HIGGINS: Several days after February 22nd, do you remember getting a phone call from Mr. Stern. . . .

PERKINS: Yes.

HIGGINS: . . . and do you remember Mr. Stern asking for assurance that you would not repeat that kind of a sale?

PERKINS: No, that wasn't the way the conversation went. Right away Mr. Stern accused us of being chisellers and he threatened us with a dispossess.

HIGGINS: But didn't you refuse to acknowledge you were in the wrong and didn't you refuse to promise not to disrupt the neighborhood again . . . ?

PERKINS: We weren't in the wrong. We made some mistakes, but we did what we had a right to do. Mr. Stern was in no mood to listen.

HIGGINS: You say you placed orders for your present stock some months ago. What about your stock for following seasons? Are you continuing to buy the same line of garments from the same manufacturers?

PERKINS: It's too early to place orders for next year and I'm not giving any promises about who we buy from. There is no shortage of manufacturers and wholesalers who can supply us with better garments, and I don't see why it should concern you where we place our orders.

ARBITRATOR: Mr. Perkins, is it your testimony that your plan is to sell the same type of garment you have been selling during the first year of your business at Westover Park?

PERKINS: That is correct.

HIGGINS: No more questions.

ARBITRATOR: Mr. Porter, have you any other witnesses?

PORTER: No more witnesses. I would like the privilege of a summation, however.

ARBITRATOR. You will have that privilege. I suggest, though, that we hear the complainant first. But before we do, I would like a matter clarified by either or both of you gentlemen. Some reference was made to 60 days' notice for termination of the lease. The lease was put in evidence, but can you direct my attention to it more specifically?

PORTER: You'll find it in Article 40. It gives the landlord the right to terminate the lease on 60 days' notice when he believes a substantial violation of its terms is being committed by the tenant. That provision also refers back to the arbitration clause so that if

there is any dispute as to whether the tenant was in fact violating the lease, the decision would be made by an impartial arbitrator.

ARBITRATOR: I see. Thank you. Is that also your understanding, Mr. Higgins?

HIGGINS: Substantially, yes. Naturally, when we call a violation to a tenant's attention we expect him to correct it. When he refuses, we have no alternative but to give him 60 days' notice.

ARBITRATOR: I just wanted to get that clause pinpointed more exactly. Now you may proceed with your summation, Mr. Higgins.

HIGGINS: I think the summation can be brief and to the point. The facts have been clearly established and the problem of contract interpretation is quite simple. Mr. Franklin has presented a sorry picture of economic distress. That is regrettable, but we aren't really concerned with his business troubles. Whatever the reason was that impelled him to depart from the established policy—a policy to which he has committed himself in the lease—the fact remains that he *has* changed his policy and *has* given cause for dissolution of the lease. He is no longer planning to sell a better line of women's dresses, coats and suits. In fact, in the most blatant and disruptive manner he has announced to the public that from now on he is in the business of selling other grades of garments. This is objectionable to all the other tenants in the development. It was precisely to prevent this sort of occurrence that all leases with Westover Park included Article 21. My client is not interested in dictating terms of business management to his tenants. We have in Westover Park clothing stores, home furnishing stores, restaurants, specialty food stores, gift shops and other establishments. The prices they charge do not concern us as long as they maintain fairly high standards. So it is not a question of our telling Fashion Frocks that they can't sell a $125 garment for $97.50. It is simply a matter of our saying that they can't sell cheap items in a manner which detracts from the general atmosphere in the area.

PORTER: Mr. Arbitrator, I can agree with counsel for Westover Park in at least one respect. The case rests on fairly well established facts and on a simple matter of contract interpretation. It is our contention that Fashion Frocks did only what was, and I quote, "incidental to the normal routine of the Tenant's business." I readily agree that if we had bought up job lot merchandise from others, had brought it onto the premises at Westover Park, and had then pro-

ceeded to sell or auction it off, we might be in violation of the lease, and a dispossess would be in order. But nothing of the sort happened. My client sold only his regular merchandise. True, he sold it at a loss, or at least some of the garments were sold at a loss. But how can anyone pretend that this is the way he intends to do business in the future? Obviously, no businessman will plan to buy good quality garments and sell them at a loss or at no profit. Mr. Franklin adopted a remedy at the end of the season which retailers everywhere use. He cleared his racks by lowering the price. It was a one-shot affair which put him in a position to continue selling a good quality merchandise at reasonable prices just as he has in the past. I will admit that we made one mistake: we misjudged the response we could get and consequently failed to alert the guards. However, this error on our part which, I might add, will not recur in the future, was more than matched by the incompetence of Westover Park's guard, who should have acted more intelligently once he saw the situation developing. Thus, the only fault my client committed was a purely technical and administrative one, which does not justify depriving him of the substantial rights he has to continue the same business for the nine remaining years of the lease.

ARBITRATOR: Well, gentlemen, before I declare this hearing closed, I would like to be certain all the evidence is in. Does either of you have anything further to put into the record? Is each of you satisfied that you have had a full opportunity to present your case?

PORTER: We are satisfied to rest our case.

HIGGINS: Our case is completed.

ARBITRATOR: In that case, I declare the hearing closed. In accordance with the rules of the American Arbitration Association an award, in writing, will be given to each of you within 30 days. Most likely, I will have the decision in your hands by next week.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE UNITED STATES*

by Martin Domke

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[1] as recently adopted by the U.N. Conference on International Commercial Arbitration, has brought to the fore important questions related to the enforcement of awards in a country other than that where they were rendered.

All previous discussions of these questions[2] dealt only with those aspects which are the subject of a *multilateral* Convention, whose purpose is revision of the Geneva Convention of 1927.[3] However, no country of the Western Hemisphere signed the Geneva Convention. In all probability, countries with a federal structure such as Canada and the United States of America would be confronted with serious difficulties of a legal and practical nature in adhering to the new multilateral Convention.[4]

The enforcement of foreign arbitral awards in those countries not adhering to the Geneva Convention or to a new one, is a problem with which foreign traders, who provide for arbitration in their contracts, are concerned. The status of enforcement in the United States of arbitral awards, rendered in other countries, will be considered in this paper.

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* Paper to be presented to the Fifth International Congress of Comparative Law to be held in Brussels, Belgium, August 1958.

1. Text in U.N. Document No. E/Conf.26/8/Rev. 1, of June 10, 1958.
2. See the articles by Habscheid, Kagel and Siegert on Enforcement of Foreign Awards, in *International Trade Arbitration: A Road to World-Wide Cooperation,* edited by Martin Domke. N.Y. 1958 (hereafter mentioned: *Int. Trade Arb.*) p. 199, 209, 213, and the articles by Bruns and Motulsky, Buelow, Eisemann, Habscheid, Hanak, Kalodera, Klein and Kopelmanas, referred to in bibliography *ibid.* p. 296.
   Adde: Besarovic, Le problème de la reconnaissance et de l'exécution des sentences arbitrales étrangères devant l'ONU, 4 Yugoslav Review of International Law 449 (1957); Eisemann, Mezger and Schottelius, Internationale Schiedsgerichtsbarkeit in Handelssachen (Arbeiten zur Rechtsvergleichung I, Hamburg 1958).
3. Text in *Int. Trade Arb.* p. 285.
4. See the articles by Sullivan and Walker on Treaty Problems, in *Int. Trade Arb.* p. 35, 49.

I.

At the outset, it should be observed that no arbitration statute in the United States—neither the Federal Arbitration Act,[5] nor the arbitration laws of seventeen states which provide for the enforcement of future arbitration clauses,[6] nor the Uniform Arbitration Act, as amended in 1957,[7] include any provision for the enforcement of foreign arbitration awards, as do statutes of other nations, e.g. Sweden[8] and Germany.[9]

Arbitration statutes in the United States deal directly only with the enforcement of awards rendered in the same state where execution is sought, and mostly provide for such enforcement in a summary proceedings restricting court interference. A special feature of these proceedings is that the court is not allowed to review the arbitrator's finding of facts or application of law.[10]

Enforcement of awards in inter-state relations, namely awards and judgments entered upon awards in a state of the United States other than that where the award and judgment were rendered, is dependent on the conflict of law rules prevailing in the United States. The rule is stated in *Moyer v. Van-Dye-Way Corp.*[11] "The general authority is to the effect that the validity of an arbitration award is determined by the law of the place of its rendition. 2 Beale, The Conflict of Laws (1935) sec. 347.6."[12] Here, the full faith and credit clause of Art. 4 of the U.S. Constitution prevails and provides for

5. 61 Stat. 670, as amended by sec. 10 of Public Law 779, of September 3, 1954, 68 Stat. 1233. Cp. Comment, Jurisdiction of the Federal Courts under the United States Arbitration Act, 27 Texas L. Rev. 218 (1948).
6. New York (date of enactment: 1920), New Jersey (1923), Massachusetts (1925), Oregon (1925), California (1927), Louisiana (1928), Pennsylvania (1928), Arizona (1929), Connecticut (1929), New Hampshire (1929), Rhode Island (1929), Ohio (1931), Wisconsin (1931), Michigan (1941), Washington (1943), Minnesota (1957), and Florida (1957).
7. See Pirsig, Some Comments on Arbitration Legislation and the Uniform Act, 10 Vanderbilt L. Rev. 685 (1957).
8. Act of June 14, 1929, relative to Foreign Arbitration Agreements and Foreign Arbitration Awards. Cp. Graaf in *International Commercial Arbitration* (Union Internationale des Avocats, Paris 1956) p. 423, 437.
9. Art. 1044 Code of Civil Procedure, as amended, transl. in Domke, On the Enforcement Abroad of American Arbitration Awards, 17 Law and Contemporary Problems 545, p. 558 n.63 (1952).
10. Cp. Note, Judicial Review of Arbitration Awards on the Merits, 63 Harvard L. Rev. 681 (1950).
11. 126 F.2d 339, 341 (3rd Cir. 1942).
12. Beale says, op. cit. at p. 1249: "Its validity (the award's) is determined by the law of the place where rendered, regardless of the law of the forum. But the foreign law must be pleaded, or it will be assumed to be similar to the lex fori. Woodrow v. O'Connor, 28 Vt. 776 (1856)," dealing with an award rendered in Canada.

the enforcement of decrees of sister-states.[13] The concept of full faith and credit relevant to inter-state enforcement of judgments entered upon awards cannot be applied to foreign awards, namely those rendered abroad against a party resident in the United States (not necessarily an American national).[14]

However, American courts do not look unfavorably upon the enforcement of agreements providing for *arbitration* abroad. On the contrary, such arbitration clauses have been enforced by federal and state courts, either in directing an American party to proceed with such arbitration, or in staying any court action instituted in contravention of the arbitration agreement.[15] This attitude is all the more remarkable since any agreement to submit to a foreign *court* is not enforceable in American courts. A distinction is thus clearly made between the extra-judicial process of private arbitration and the "ousting of courts" of ordinary jurisdiction by reference to a foreign court.[16]

II.

Enforcement of foreign awards has been had in the United States primarily in New York State courts. Foreign awards have been liberally enforced without any reference to the concept of reciprocity.[17] Even in the absence of any statutory provision (see supra I) or treaty provision (see infra III), a most liberal practice has been followed

13. Cp. Stern, the Conflict of Laws in Commercial Arbitration, 12 Law and Contemporary Problems 567, 575 n.25 (1952); Note, Commercial Arbitration and The Conflict of Laws, 56 Columbia L.Rev. 902, 914 n.73 (1956).
14. See Reese, The Status in this Country of Judgments Rendered Abroad, 50 Columbia L.Rev. 783 (1950), and Full Faith and Credit to Foreign Equity Decrees, 42 Iowa L.Rev. 183 (1957).
15. See Corbin, Enforceability of Contractual Agreements for Dispute Settlement Abroad, in *Int. Trade Arb.* p. 251; Comment, Dismissal of Suit Brought by a United States Citizen where Alternative Forum is Abroad, 25 Un. Chicago L.Rev. 377, 378 n.8 and 9 (1958); Note by Domke on Reynolds Jamaica Mines, Ltd. v. Societe Navale Caennaise, 239 F.2d 694 (4th Cir. 1957), Revue de l'Arbitrage 1957, p. 60; 13 Arb. J. 30 (1958).
16. Cp. Giuffre v. The Magdalene Vinnen and North German Lloyd, 152 F. Supp. 123 (E.D. N.Y. 1957), where an action arising out of the liability of a charterer was stayed pending an arbitration in Bremen, Germany. On the other hand, the court did not enforce an agreement which required the submission to the District Court of Rotterdam, Holland "to the exclusion of any other judge," Chemical Carriers v. L. Smit & Co.'s Internationale S., 154 F. Supp. 886 (1957).
17. For an interesting comparative survey and further references, see Nadelmann, Non-recognition of American Money Judgments Abroad and What to do About it, 42 Iowa L.Rev. 236 (1957).

in the United States in cases where personal jurisdiction upon the American party was properly obtained abroad. The leading cases of *Gilbert v. Burnstine*[18] and *Sargant v. Monroe,*[19] where arbitral awards rendered in England were enforced against New York parties, are in line with the well-settled rule of American conflict of laws (supra n.12) that the validity of an award depends on the observance of the law of the place where the award was rendered.[20]

In a more recent New York court proceeding, an award rendered by the Appeal Tribunal of the London Corn Trade Association was enforced in *Oilcakes and Oilseeds Trading Co., Ltd. v. Sinason Teicher Inter American Grain Corp.*[21] The English party had obtained a default judgment, based on the award, against the N. Y. party in the High Court of Justice, which was affirmed by the Court of Appeal of England; a petition of appeal to the House of Lords was dismissed. The English judgment was challenged in the New York court because the requirements of New York law in regard to obtaining in personam jurisdiction of defendant had not been satisfied.[22] In an amended complaint the action on the English judgment was transformed to one on the award and "the motion for summary judgment upon the award in favor of the plaintiff and against the defendant" was granted. This judgment vacated a previous decision[23] dismissing the complaint by reason of the fact that under English law any cause of action which plaintiff had by reason of the award was merged in the English judgment. However, the court recognized on reargument that the doctrine of merger, though applicable to the judgments of this state and sister states, is not to be applied to

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18. 255 N.Y. 348 (1931); for details and annotations to this case, see Domke, supra n.9, at p. 550, and n.28.
19. 268 App. Div. 123, 49 N.Y.S. 2d 546 (1944).
20. See also on the enforcement of another award rendered in London, Cerf v. La Maison du Paysan du Sud-Ouest, 110 N.Y.S. 2d 127 (1952). Other N.Y. cases where German awards were enforced, are Coudenhove-Kalergi v. Dieterle, 36 N.Y.S. 2d 313 (1942: arbitration board of the theatrical profession), and Stern v. Friedman, N.Y. Law Journal, February 21, 1945, p. 691 col. 7. In the latter case the N.Y. judgment was entered upon "an adjudication which under German law has the effect of final judgment." The award in question was based on an arrangement in a bankruptcy proceedings which was approved by the German court (files No. 3205-1944, and 8627-1945 of the N.Y. City Court).
21. 9 Misc. 2d 651, 170 N.Y.S. 2d 378 (Feb. 4, 1958).
22. Referring to Ross v. Ostrander, 192 Misc. 140, 79 N.Y.S. 2d 706 (1948), for the proposition that by service of a writ out of jurisdiction under the English Rules, the English court did not obtain jurisdiction of the New York defendant.
23. N.Y. Law Journal, Nov. 29, 1957, p. 7, col. 4.

judgments of foreign countries.[24]

Finally, we may mention a recent decision of a Federal Court of Appeals, *Standard Magnesium Corp. v. Otto Fuchs, K. G. Metallwerke*,[25] which affirmed a judgment of the U.S. District Court for the Northern District of Oklahoma on an award rendered in Oslo, Norway in an ex parte proceeding under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. These Rules provide, in case of non-participation of a party, that the Court of Arbitration, (the administering agency), shall order that "the arbitration be proceeded with, such refusal or absence notwithstanding."[26] The challenge to the validity of the award, because no previous court order had been obtained directing arbitration pursuant to Art. 4 of the Federal Arbitration Act, was refuted, the court considering this provision "permissive" by its terms. "If the agreement provides that where one party refuses or fails to submit to arbitration, that an arbitrator may be appointed and that the arbitration may proceed ex parte, and further provides for the procedure to be followed in such an ex parte proceeding, there is no occasion to invoke the remedy of §4. Such a remedy is necessary only in those cases where one party refuses to participate in the arbitration and a court order is necessary in order for the arbitration to proceed ex parte."[27]

This judgment, from which no petition for certiorari with the U.S. Supreme Court had been filed, follows the decisions of other Circuit Courts of Appeal.[28] A court order directing arbitration is not necessary to institute ex parte arbitration proceedings, because of the "permissive" and "not mandatory" character of such statutory provisions.[29] The decisions are indeed of great importance for the de-

24. Note 21, at p. 652, 380 respectively, referring to Freeman on Judgments (5th ed.), vol. 3, §1502; 31 American Jurisprudence, Judgments, §538, and the Sargant v. Monroe case, supra n.19.
25. 251 F.2d 455 (10th Cir., Dec. 16, 1957).
26. Similarly, Rule 29 of the Commercial Arbitration Rules of the American Arbitration Association and Rule 28 of the Inter-American Commercial Arbitration Commission provide that "Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the other party to submit such evidence as he may require for the making of an award."
27. At p. 458; Note by Eisemann, 3 Recht der Internationalen Wirtschaft 185 (1957).
28. Kentucky River Mills v. Jackson, 206 F.2d 111 (6th Cir. 1953), cert. den. 346 U.S. 887; Kanmak Mills v. Society Brand Hat Co., 236 F.2d 240 (8th Cir. 1956).
29. In the same way: International Brotherhood of Teamsters v. Shapiro,

velopment of foreign trade arbitration, inasmuch as they facilitate arbitration abroad when such foreign place was expressly mentioned in the parties' agreement, or reference was made to rules of procedure which authorize the agency administering the arbitration to designate such place.[30]

III.

A new development in the United States should be mentioned, namely that its bilateral Treaties of Friendship, Commerce and Navigation provide for the enforcement of arbitration agreements and of awards in disputes between nationals and corporations of the respective countries. It is provided that enforcement cannot be denied for the reason that the arbitration award was rendered in another country or that the nationality of the arbitrator is not that of the party concerned. These provisions are included in 13 treaties; those with Ireland, Greece, Iran, Israel, Japan, West Germany, the Netherlands, Korea and Nicaragua are in force, whereas those with Italy, Denmark, Colombia and Haiti have not yet been ratified.[31]

As a pattern, art. V(2) of the Treaty with Germany, of October 29, 1954,[32] states: "Contracts entered into between nationals or companies of either Party and nationals or companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. Awards only rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled

138 Conn. 57 (1951); Battle v. General Cellulose, 129 A.2d 865 (N.J. 1957).

30. Art. 18 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce; sec. 10 of the Rules of the American Arbitration Association and of the Inter-American Commercial Arbitration Commission. Cp. also the agreements of the American Arbitration Association with foreign commercial organizations, which provide for designation of such place by a joint committee of which the chairman is a neutral: with the Japan Commercial Arbitration Association, The Japanese Annual of International Law vol. 1 (1957) p. 165; with the Federation of Indian Chambers of Commerce and Industry, see Bansal, The Practice of Commercial Arbitration in India, 13 Arb. J. 23 (1958).
31. See the articles by Sullivan and Walker, supra n.4.
32. 7 United States Treaties 1839.

to be declared enforceable by such courts, except where found contrary to public policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof."

This treaty, which came into force on July 14, 1956, was not considered in the *Standard Magnesium case* (supra n.25) though in that arbitration between a German and an American corporation the arbitrator was a national of a country other than that of the two parties, and the arbitration was also held in a third country, namely Norway. Since the contractual rights of the parties were established before the treaty went into force and effect, the latter was not controlling. It is a well established principle that treaties do not have retroactive effect upon contractual relations of the parties.[33] International treaties and conventions between governments which give official recognition and status to the arbitration process are growing in importance. However, the underlying principle of arbitration remains the will of the parties. American courts will give full force and effect to agreements to arbitrate which bind the parties to the award, thus looking to the will of the parties, as expressed in the contract, even in the absence of international agreements.

33. 52 American Jurisprudence, Treaties sec. 12 Thus it was stated in Estate of William Stock, 172 N.Y.S. 2d 927, 928 (March 5, 1958): "The 1954 Treaty of Friendship, Commerce and Navigation [with Germany] is prospective in its operation [and] deals with future relations."

THE FOREMAN'S ROLE IN ARBITRATION*

by Joseph S. Murphy

To management as to labor, arbitration is a joint venture—an area where supervisors and higher management are clearly united in the defense of the company's position. In a majority of cases, supervisors are important participants in arbitration. It is clear, then, that an understanding of arbitration is essential.

Throughout the years the arbitration tribunals have heard foremen and supervisors as witnesses and have seen them as people who establish precedent in areas not covered by contract. Attorneys and personnel directors recognize that a case can be won or lost by supervisors' practices and testimony; arbitrators' decisions also reflect the role of the supervisor in a large variety of cases.

In order to determine just how important the supervisor is in arbitration, the Research Department of the American Arbitration Association recently surveyed 1,000 consecutive cases—eliminating only wage cases and highly technical job-evaluation or incentive-rate disputes. The supervisor appeared in more than half the cases in one or more of the following categories: 1) as a witness in the dispute, 2) as the man who reported the dispute to management, 3) as participant in the events, or 4) as a person who established precedent.

The Foreman's Role in 1,000 Cases

Role	Cases	Percentage
As a witness	421	42
As a reporter of the events	300	30
As a participant in events	81	8
As an architect of past practice	43	4
As participant in the arbitration in one or more of the categories above	581	58

* This article is based upon an address delivered at the American Management Association's annual conference on supervision in Chicago, Illinois, in December 1957. It was reprinted in this form by *Supervisory Management*, May 1958, a publication of the AMA.

These figures overlap, since in 255 grievances the supervisor appeared as both a witness and the reporter of the incident to management. In 54 grievances the supervisor appeared as a witness, reported the incident, and participated in the events leading to the grievance. In summary, in 581 cases out of 1,000 the supervisor played some part in the actual arbitration; and there is indication that supervisors appeared in almost 200 additional cases, as either a witness, the one who reported the issue, a participant, or the one who established precedent.

Since the supervisor appears so frequently in arbitration, the question arises: What should he know about the arbitration process?

First, *arbitration is here to stay.* Approximately 95 per cent of the 125,000 collective-bargaining agreements in existence contain arbitration clauses, and each year the volume of arbitration seems to increase. In 1956, American Arbitration Association cases had a 7 per cent increase over 1955. In 1957, as of October 31, there was a 21 per cent increase over 1956. The Federal Mediation and Conciliation Service also reports an increase in cases over the last three years. There is every indication that with long-term contracts there will be a still further increase in the number of cases in the next few years.

The Nature of Arbitration

Arbitration is a judicial process. It is defined in the pamphlet, *Labor Arbitration Procedures and Techniques*: "Arbitration is the referral of a dispute by voluntary agreement of the parties, to an impartial person for determination on the basis of evidence and argument presented by such parties, who agree in advance to accept the decision of the arbitrator as final and binding."

The function of the arbitrator is distinct from that of the mediator—the latter tries to find a solution that both parties will accept. In most instances today the function of the arbitrator is to review the facts and evidence presented to him and make a decision upon this material, within the framework of the agreement.

There is a clear corollary to this, that the arbitration clause is a most important clause within the contract. Management representatives should be constantly aware that their activity under the contract, their interpretations of the contract, and even the practices that in a sense are unwritten supplements to the contract, may be brought up for review by an arbitrator.

Supervisors should be familiar with the entire process by which

cases reach arbitration—not merely their part in the grievance procedure. They should be particularly aware of and, in many instances, consulted in the decision to take a case out of the negotiation-and-discussion stage and into arbitration.

Supervisors should be aware of the work that enters into the preparation of a case. The entire case is reviewed to determine the history of the grievance; the collective-bargaining contract is scanned for clauses that may have some bearing on the case. All needed documents and papers are assembled; all witnesses are interviewed beforehand and a written summary is made of their statements, to serve as a check list in presenting their testimony at the hearing. The foreman is likely to be involved in many of these procedures. Also, management must have the clearest possible idea of the union's point of view and of the arguments it will present. As the person closest to the initial stages of the grievance, the supervisor can inform management of the union's views as they were originally stated.

The Atmosphere of a Hearing

The atmosphere of a hearing is somewhat different from negotiation sessions. The tone may vary from moderately formal to very formal—depending upon the relationship between the company and the union. Before participating in a hearing, a man should realize also that the prime objective of both the management team and the union team is to present *evidence* to the arbitrator through witnesses and documents.

The demeanor of witnesses, their calm, objective approach, and appropriate records that can be intelligently discussed are sometimes much more important than the arguments either side may use.

An arbitrator's award is final and binding upon all parties. Yet management often fails to instruct line supervisors about the award. The supervisor must know more than the terms of the award. He should know what attitude to adopt toward it. Often, if the company has won, the supervisor considers this a justification of his actions, and he is naturally proud of this. But his behavior should not be such that even though management has won the decision it loses ground generally in its labor relations. This is no time for boasting of victory or rubbing salt into the wound. It is the time to accept the victory, making every effort to hurt as few people's feelings as possible. If the decision is adverse, it is equally important to accept it in good faith and with good sportsmanship.

What should the supervisor know specifically when he becomes a witness? First, he should have an understanding of the entire case and his part in it—it is not enough for him just to know that he is to testify to certain facts in the dispute. He should know the importance of his testimony, he should be calm and objective, and he should testify only to those matters of which he has first-hand knowledge. When he must testify to the ability or incompetence of a person, he should be prepared to state the facts on which he bases his judgment. The personal judgment of a supervisor is certainly admissible as evidence, but it is most effective when it is supported by specific facts or details.

The supervisor should be prepared for cross-examination, and should not be frightened by the occasionally belligerent tone of the cross-examiner. He should avoid getting into an argument with the other side, remembering always that his remarks, his demeanor, and his credibility will all be considered by the arbitrator in his decision. Furthermore, the supervisor must return to work with men against whom he may be testifying. Therefore, it is highly desirable that he give every indication of being fair, honest, and without prejudice against the grievant or the other workers in the shop.

The Supervisor's Responsibility

When a supervisor is the one responsible for reporting the full details of an event to management, both at the beginning of the grievance and in preparation for arbitration, his report may be the key evidence in the case. It is elementary that he be absolutely accurate, that he present all details, and that he base his judgments and opinions on the facts. Above all, if he has made errors, he should be willing to admit them to higher management. It is far better to make this admission in private than to have it said at the hearing that he concealed or distorted information. Once the credibility of a witness is brought into question, the entire report loses ground, and the witness loses face before the arbitrator and others at the hearing. Sometimes a case that would otherwise have ended in a favorable decision for the company has been weakened because of a single inaccurate or distorted statement.

When the supervisor himself is a participant in the events leading to a grievance, he should be conscious that his actions are reviewable. He should act in a straight-forward, honest manner and should do his job without prejudice or favoritism, realizing his full responsi-

bility to the company, to the men, and to himself. He should, of course, make notations in a logbook or diary of situations that may lead to later grievances. (This, of course, doesn't mean that a supervisor should take out a book and make a notation after every happening throughout the day. But since his actions may be reviewed many months later, it is clear that intelligently written records can be of real assistance to him.)

Whenever a supervisor deviates in any way from company policy, company rules, or the collective-bargaining agreement, or whenever he is obliged to make a decision for which there is no rule and on which the contract is silent, his actions tend to create a precedent. This happens, we know, every hour in the week. The supervisor has, no doubt, been advised to consult with his superiors when an emergency arises, but often this is impossible or impracticable at the time. When an exception is made to policy or rules, or when any deviation occurs from the regular course of the day's activity, the exception should be clearly noted in his records. When he has departed from practice, clear reasons for the deviation must be recorded.

A Word of Warning

A word of warning might be added: Supervisors often have the habit of testifying to past practice throughout the company or past practice in other departments. But they should affirm only to the past practice and events of which they themselves have firsthand knowledge. If the supervisor has knowledge that a certain practice is customary in other departments of the plant, he is free, of course, to testify to that effect. But this type of secondhand report is admissible only if its nature is clearly indicated.

Every supervisor owes it to himself—and to his company—to know the nature and function of arbitration, its importance in the contract, the procedures whereby cases reach arbitration, how cases are prepared, the nature of the arbitration hearing, and in particular his own potential role—as witness, reporter, participant in events, or creator of precedent. If supervisors recognize this obligation, their contribution to arbitration as a democratic process of settling labor-management disputes can far surpass the contributions of all the experts in the field.

THE PROBLEM OF UNIFORM ARBITRATION LEGISLATION IN CANADA

by Gerald L. Morris

It is an unfortunate fact that the question of enacting uniform arbitration legislation in the Canadian provinces is at present a rather dead issue. The problem was raised and quickly buried at the 1931 Conference of Commissioners on Uniformity of Legislation in Canada meeting at Murray Bay, Ontario.[1] A draft Uniform Provincial Arbitration Act prepared by the Chamber of Commerce was considered and rejected as unnecessary. The report on this draft act stressed the general similarity of arbitration statutes already enacted by the common law provinces, and concluded that the legislation in force was satisfactory.

It may fairly be argued that the Commissioners' report glossed over several problems rather complacently, but their action was sufficient to smother the move for true uniformity in this field. Occasional attempts since then to revive the matter have proved relatively ineffective. There may, however, be valid reasons for taking a fresh look at the situation today.

It should be noted at the outset that jurisdiction over arbitration in general commercial matters is reserved to the provinces. It is generally agreed that the British North America Act of 1867 would oust any federal jurisdiction, with the possible exception of certain narrow fields (such as maritime trade) awarded to the Dominion by section 91 of the Act.[2] The nine common law provinces have exercised their power by enacting legislation closely paralleling the provisions of the English Imperial Arbitration Act of 1889 (52 and 53 Vict., c. 49). Thus the major sections use almost identical terminology.

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1. See the Proceedings of the Canadian Bar Association, 1931, Vol. 16, p. 274.
2. For comments on this point, and a general review of the Canadian legislation, see Claxton, "Commercial Arbitration Under Canadian Law," (1943), *Canadian Bar Review*, 171.

The present Ontario Act is typical. Its more important substantive provisions provide:[3]

1. The Act applies to agreements to submit future as well as present differences (R.S.O. 1950, c. 20, s. 2).
2. Submissions are made irrevocable, except by leave of the Court, and are given the same effect as an order of the Court (s. 4).
3. Provision is made for staying legal proceedings (s. 7).
4. Provision is made for appointment of arbitrators in event of default or other contingency (s. 8).
5. Attendance of witnesses and production of documents may be compelled (s. 14).
6. The award may be enforced as a judgment of the Court (s. 13).

While it is true that this formula provides a generally satisfactory basis for arbitration, it may be suggested that the matter should not be permitted to rest in its present state. Minor differences remain, and every lawyer knows that minor variations can lead to major disputes. Every effort should be made to remove sources of possible confusion and uncertainty. For example, there appears little agreement on the extent of the right of appeal from the award. It would seem that this defect could well be remedied. Nor should too much weight be given to the oft-cited argument that changes will remove the value of past interpretations by the judiciary. Such an objection could be used to stultify any progress in legislative drafting.

Although the similarity of the statutes in the common law provinces makes the necessity of change less urgent with respect to them, a much more serious problem arises out of the situation in the civil law province of Quebec. It may well be that here lies the crux of the problems besetting commercial arbitration in Canada. The Quebec arbitration law is found in articles 1431 to 1444 of the Code of Civil Procedure. The most important of several differences between the Quebec law and the common law position is that articles 1431 and 1434 read together prevent the submission of future disputes to arbitration. Despite the statement of Fournier, J., in *Royal Electric Co. v.*

3. See also: R.S. Alta, 1942 c. 111; R.S. Br. Col., 1948 c. 16; R.S. Man., 1954 c. 9; R.S. New Br., 1952 c. 9; R.S. Newfld., 1952 c. 114 (Pt. 6); R.S. N. Scotia, 1954 c. 13; R.S. P.E.I., 1951 c. 12; R.S. Sask., 1953 c. 99. The Prince Edward Island statute is based on English legislation antedating the 1889 Imperial Act, but is generally similar to the acts in the other common law provinces.

City of Three Rivers (1894), 23 S.C.R. 289, which implied the contrary, most authorities agree that an agreement submitting a future dispute to arbitration would not be enforceable in Quebec courts. This, of course, places a crippling limitation on the value of arbitration in trade matters.

The Quebec law was codified in 1867 to accord with the civil law then obtaining. Unfortunately, the Quebec code has remained static, whereas the law of other civilian jurisdictions has advanced. In France, on whose code the Quebec code is modeled, the law of 31 December, 1925, permitted the submission of future disputes to arbitration in commercial transactions.[4] As a result, commercial arbitration has forged ahead in France, while lagging in Quebec. Clearly the need for amendment of the Quebec code is great, and it does not appear that there is any basic conceptual obstacle in the civilian approach which would prevent bringing the code up to date.

The reluctance of Quebec to alter its views on arbitration may well explain the undisputed failure of commercial arbitration to achieve any degree of popularity in Canada. Far more cases in this field are decided in the regular courts than before arbitration boards. A clue to this refusal to follow the general world trend may be found in the fact that Toronto, Ontario, and Montreal, Quebec, are the centers completely dominating Canadian commerce. Most transactions with parties in foreign countries, or in Canada itself, originate in either one of these cities. A large volume of Canadian business agreements are concluded between a party in Toronto and one in Montreal. So long as major differences in the arbitration legislation of Ontario and Quebec continue, it is doubtful that Canadian business will fully accept arbitration as the solution to their difficulties.

The same obstacle has probably contributed greatly to the difficulty encountered by the sponsors of the Canadian-American Commercial Arbitration Commission.[5] Under the agreement of May 1943, between the American Arbitration Association and the Canadian Chamber of Commerce, a panel of arbitrators was set up to work

4. This development is noted in 1 Dalloz, "Nouveau Répertoire de Droit," 193 (1947), under the title "La clause compromissoire," and it is further pointed out that many other exceptions to the older civilian rule have now been developed in the French law. See also Cohn, "Commercial Arbitration and the Rules of Law, A Comparative Study," 4 *U. of Toronto L.J.* 1 (1941) at p. 3-7, for a comparison of the civil and common law arbitration systems.

5. For a brief note on the Canadian-American Commission, see Domke and Kellor, "Western Hemisphere Systems of Commercial Arbitration," 6 *U. of Toronto L.J.* 307 (1946) at p. 325-328.

under uniform rules, and an educational program was instituted. The efforts of its supporters have clearly bogged down at the Canadian end in face of massive Canadian indifference. That this is deplorable is an understatement, especially in view of the success of arbitration in jurisdictions such as New York State and the United Kingdom.

The solution may lie partly in a renewed aggressive educational campaign to acquaint interested parties not only with the advantages of arbitration, but to point out the defects of the law presently in force. The very act of convening a conference composed of business leaders, lawyers and legislators from the various provinces, might serve to focus public attention on the issue. In view of the relative success of the move toward uniform acts in the United States, it might be deemed advisable to invite representatives from the United States who have been active in the movement, to participate and discuss their methods of procedure. This would also permit discussion of the desirability of bringing United States and Canadian arbitration statutes closer together in form (although constitutional differences could well render this inadvisable). The huge volume of U.S.-Canadian trade makes it essential that one eye be kept on the possibility of smoothing the settlement of disputes between businessmen in the two nations.

DOCUMENTATION

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION
CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS
June 10, 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral

clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in article II were,

under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V paragraph (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the

party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

1. In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signature and ratifications in accordance with article VIII;
(b) Accessions in accordance with article IX;
(c) Declarations and notifications under articles I, X and XI;
(d) The date upon which this Convention enters into force in accordance with article XII;
(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

RESOLUTION OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

June 10, 1958

The Conference, believing that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field,

Having considered the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General, document E/CONF.26/6,

Having given particular attention to the suggestions made therein for possible ways in which interested governmental and other organizations may make practical contributions to the more effective use of arbitration,

Expresses the following views with respect to the principal matters dealt with in the note of the Secretary-General:

1. It considers that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been done in this field by interested organizations,[1] and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to co-ordinating their respective efforts;
2. It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade; and believes that useful work may be done in this field by appropriate governmental and

1. For example, the Economic Commission for Europe and the Inter-American Council of Jurists.

other organizations, which may be active in arbitration matters, due regard being given to the need to avoid duplication of effort and to concentrate upon those measures of greatest practical benefit to the regions and branches of trade concerned;

3. It recognizes the value of technical assistance in the development of effective arbitral legislation and institutions; and suggests that interested governments and other organizations endeavour to furnish such assistance, within the means available, to those seeking it;
4. It recognizes that regional study groups, seminars or working parties may in appropriate circumstances have productive results; believes that consideration should be given to the advisability of the convening of such meetings by the appropriate regional commissions of the United Nations and other bodies, but regards it as important that any such action be taken with careful regard to avoiding duplication and assuring economy of effort and of resources;
5. It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing organizations,[2] and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation.

Expresses the wish that the United Nations, through its appropriate organs, take such steps as it deems feasible to encourage further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes through the facilities of existing regional bodies and non-governmental organizations and through such other institutions as may be established in the future.

Suggests that any such steps be taken in a manner that will assure proper co-ordination of effort, avoidance of duplication and due observance of budgetary considerations.

Requests that the Secretary-General submit this resolution to the appropriate organs of the United Nations.

2. For example, the International Institute for the Unification of Private Law and the Inter-American Council of Jurists.

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

ARBITRATION CLAUSE COVERING DISPUTES OVER "APPLICATION" OF AGREEMENT HELD INAPPLICABLE TO DISPUTES OVER INTERPRETATION OF AGREEMENT. The employer sought to stay arbitration of a dispute over the inclusion of certain photographers within the definition of employee in the collective bargaining agreement. The arbitration clause covered "all grievances arising from the application of this agreement." The Appellate Division, in affirming the stay of arbitration, held the dispute to be one of contract interpretation and said: "No provision is made for grievances relating to 'interpretation', nor does the grievance and arbitration machinery apply to any dispute arising from or relating to the collective bargaining agreement. We may not ignore the limitation adopted by the parties in defining the scope of the grievances subject to settlement and arbitration for it is well established that an express agreement to arbitrate clearly assented to is required and will not be implied." A strong dissent by Judge Breitel reasoned that whether photographers are a class excluded by contract involved the "application" of the contract and rightfully belonged to arbitration. *New York Mirror v. Potoker* (Secretary-Treasurer, New York Newspaper Guild, Local 3), 171 N.Y.S. 2d 748 (App. Div. First Dept., McNally, J.).

PROVISION IN INSURANCE POLICY FOR APPRAISAL OF INJURIES DOES NOT CONSTITUTE AGREEMENT TO ARBITRATE. Insured petitioners sought to compel the insurer to appraise injuries suffered by them. In denying the motion the court said: "An agreement for appraisal as an incident to a contract is not a basis for an arbitration proceeding within section 1448 of the Civil Practice Act (*Delmar Box Co. v. Aetna Ins. Co.,* 309 N.Y. 60) . . . Since the contract does not provide that the appraisers may resolve . . . any issue respecting respondent's liability under the policy, no resort to arbitration may be had." *Ross v. Hardware Mutual Cas. Co.,* N.Y.L.J., April 10, 1958, p. 9 (Hart, J.).

TESTIMONY OF OBJECTIONS TO TERMS OF CONTRACT OTHER THAN ARBITRATION CLAUSE CANNOT SUPPORT A STAY FOR LACK OF ASSENT TO ARBITRATION. Petitioner sought stay of arbitration for lack of assent to arbitration clause and at trial presented testimony on specific objections to certain contract terms. However, the petitioner failed to adduce evidence of objections to the arbitration clause. The court, in denying a stay of arbitration, held that where specific objections to contract provisions were noted and a party is silent as to the others, it is deemed to have waived objections to these provisions. The petitioner not having shown objections to the arbitration clause had, as the court said, "by its acts and conduct, assented to the provisions for arbitration." *Slifka Fabrics v. Schneider Silk Mills,* 171 N.Y.S. 2d 56 (Dickens, J.).

BROAD ARBITRATION CLAUSE IN COLLECTIVE BARGAINING AGREEMENTS RATHER THAN SEPARATE PENSION AGREEMENTS HELD APPLICABLE TO JOB TERMINATION GRIEVANCE. Jobs of employees reaching 68 years were terminated by employer before employees were eligible for pensions. The pension agreements were separate from the collective bargaining contract and the employer contended that these agreements covered job termination and did not provide for arbitration. The unions sought specific performance under §301(a) Taft-Hartley Act. The arbitration clause of the collective bargaining contracts covered "any . . . controversy that may arise between the parties" and "any . . . grievance which cannot be settled on the job" but specifically excluded certain matters from arbitration. The court, finding that the broad language covered conditions of employment and that "certainly age is a condition of employment," said: "In view of the broad terms used in the agreements . . . , and in view further of the fact that the parties, by express provision, excluded from arbitration those matters which they did not desire to arbitrate, the Court is of the opinion that the dispute between the plaintiffs and the defendant is an arbitrable dispute within the meaning of the collective bargaining agreements." *Butte Miners' Union No. 1 of International Union of Mine, Mill and Smelter Workers v. Anaconda Co.,* 159 F. Supp. 431 (D. C. Montana, Murray, Ch. J.).

COURT RULES THIRD PARTY WAS NOT "UNINSURED" WITHIN MEANING OF ACCIDENT LIABILITY POLICY AND STAYS ARBITRATION OF THE DAMAGES SUSTAINED BY INSURED. Petitioner was injured in an auto accident. The other party to the accident was insured under a liability policy but its insurer refused to acknowledge liability, claiming that its policyholder failed to cooperate according to the terms of the policy. The petitioner then sought to recover under his own policy on the grounds that the other driver was "uninsured" and petitioned the court to direct arbitration of the damages sustained. The court, in denying the petition and granting a stay of arbitration, characterized the situation as "rather unusual and unique" and said: "The clause merely granted to said insured [petitioner] the benefit of insurance if he was injured in an accident with an automobile which *at the time of the accident* did not have liability insurance. The situation does not cover the contingency such as is here being

presented, where there was insurance in existence on the day of the accident but where the insurance company, for reasons satisfactory to itself, thereafter contended that it was not liable upon its contract because of a breach thereof by its own insured." *Berman v. Travelers Indemnity Co.*, 171 N.Y.S. 2d 869 (Friedman, J.).

AGREEMENT TO ARBITRATE FUTURE DISPUTES MUST BE IN WRITING BUT NEED NOT BE SIGNED. Lack of signature was set forth as defense to an action in Massachusetts to enforce a New York judgment upon an award. Said the Supreme Judicial Court: "Under Art. 84, Section 1449, of the [N. Y.] Civil Practice Act a contract to arbitrate a controversy thereafter arising, as distinguished from an existing controversy, need merely be in writing, and a signature is not required," referring to *Helen Whiting, Inc. v. Trojan Textile Corp.*, 307 N.Y. 360, and *Nimphius v. Greyhound Corp.*, 165 N.Y.S. 2d 996. *Samincorp South American Minerals and Merchandise Corp. v. Reubin Lewis et al.*, No. 11,988, Suffolk County, 1958, Supreme Judicial Court, Mass. (Wilkins, C. J.).

II. THE ARBITRABLE ISSUE

DISPUTE OVER CORPORATE DIRECTOR'S ALLEGED CONSENT TO SALE OF CORPORATE REALTY IS ARBITRABLE, SUCH DISPUTE INVOLVING QUESTION OF FACT RATHER THAN OF EXERCISE OF DIRECTOR'S DISCRETION. Petitioner and director-respondents were deadlocked. The corporation entered into a contract to sell its realty to a third party. Petitioner claims that he did not consent to the sale and that arbitration of the consent issue in effect "compels him to exercise his discretion." Respondents claim he gave oral consent to the transaction. In denying petitioner's motion for a stay of arbitration, the court said: "Here the contention is that he has already exercised his discretion and now seeks to repudiate what he has done. Whether he did so or not is obviously a dispute. And whether his doing so orally in the face of a prohibition in the contract [stockholders' agreement] against oral modification, was legally binding, is also a dispute (*Keen v. Sinai*, 136 N.Y.S. 2d 427)" and thereby subject to arbitration. *Application of Grazi*, 171 N.Y.S. 2d 428 (Hogan, J.).

DISSOLVED PARTNERSHIP'S LIBEL CLAIM WHICH AROSE PRIOR TO DISSOLUTION IS AN ARBITRABLE CONTROVERSY UNDER NEW YORK STOCK EXCHANGE CONSTITUTION. Plaintiff brought suit against defendant for libel. In a court action, based on an allegedly libelous letter written prior to the dissolution of the partnership, defendant moved to stay the action and to proceed with arbitration under the Stock Exchange Constitution. Plaintiff contended that as a dissolved partnership it was no longer bound by the Constitution and that libel was not covered by the arbitration clause. In granting a stay, the court held that "if plaintiff persists as an entity for the purpose of suing beyond the date of its dissolution, it also persists as a member subject to the Constitution of the Exchange." Since the Constitution provides that any controversy between members is arbitrable

the court held that "it would appear that this agreement was sufficiently broad to include it [libel]." *Osborne & Thurlow v. Hirsch & Co.*, 172 N.Y.S. 2d 523 (Steuer, J.).

DISPUTE OVER JOB CLASSIFICATION NOT EXEMPTED FROM ARBITRATION BY SPECIFIC "WAGE STRUCTURE" EXCLUSION IN CONTRACT. A broad arbitration clause in the collective bargaining agreement specifically excepted the "fundamental relationship of the parties or wage structure" from arbitration. The employer, seeking a stay of arbitration, contended that the placing of jobs into higher categories and hence higher wage brackets involved the "wage structure." In denying a stay the court said: "While the question is not free from doubt, the court is of the opinion that the present dispute does not involve the 'wage structure'. . . . The application of the wage provisions to any particular state of facts or any individual employee is not the same as a dispute over the general wage set-up itself. . . . The word 'structure' itself implies something fundamental or basic. The present dispute involving the labor grade into which a particular job should be placed, even if considered to be one involving wages, is not of such fundamental character." *Ward Leonard Electric Co. v. Local 419, International Union of Electrical, Radio and Machine Workers, AFL-CIO*, N.Y.L.J., April 2, 1958, p. 13 (Gallagher, J.).

DISPUTE OVER WHETHER SOME WAGE INCREASE WAS JUSTIFIED BY RISE IN THE COST OF LIVING IS ARBITRABLE BUT IT WOULD BE BEYOND AUTHORITY OF ARBITRATOR TO AWARD A FIXED AMOUNT OF INCREASE, under a contract limiting arbitration to "the meaning or application" of the collective bargaining agreement. Union served notice of arbitration as to whether there should be a wage increase and what the amount of the increase should be. The contract stated that in the event of a certain 5 percent rise in the cost of living index the union could demand reopening of the contract for "the purpose of negotiation of wages only." Employer moved for a stay of arbitration. In holding the first issue arbitrable, the court said: "The first question to be submitted to arbitration is one of interpretation and is properly arbitrable, for the agreement is susceptible of the construction that a 5 percent or more rise in the index would justify *some* increase. The second question proposed to be arbitrated is, however, not arbitrable, since it seeks to have the amount of the increase fixed, not through 'negotiation,' as required by the contract, but by the arbitrators, who are expressly limited to deciding questions of interpretation and application of the contractual provisions." *Columbia Broadcasting System v. Bohlinger*, N.Y.L.J., April 29, 1958, p. 7 (Hecht, J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

WHEN ARBITRATION CLAUSE IN FOREIGN TRADE CONTRACT PROVIDES FOR EX PARTE PROCEEDINGS A FEDERAL COURT ORDER IS NOT REQUIRED TO ENFORCE ARBITRATION AND COURT WILL ENTER JUDGMENT UPON A FOREIGN AWARD. An Oklahoma and a German corporation provided in their contract for the sale of raw

magnesium for arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. These Rules provide that upon refusal of a party to arbitrate "the Court of Arbitration shall order that the arbitration be proceeded with, such refusal or absence notwithstanding." The American party refused to participate in an arbitration; the Court of Arbitration, the administrative agency, appointed one arbitrator and ordered arbitration to proceed in Oslo, Norway. In an appeal from a common law judgment upon the award rendered against the American seller, the latter contended that the award was without effect since the buyer had not obtained a court order under Section 4 of the Federal Arbitration Act directing arbitration. Said the court, in rejecting this contention and affirming the lower court judgment: "Section 4 of the Act provides a remedy by summary proceedings in the nature of specific performance where a court order is necessary in order for the arbitration to proceed. It does not follow, however, that Sec. 4 must be resorted to in every case where one party refuses to proceed with the arbitration. It is permissive by its terms. If the agreement provides that where one party refuses or fails to submit to arbitration, that an arbitrator may be appointed and that the arbitration may proceed ex parte, and further provides for the procedure to be followed in such ex parte proceeding, there is no occasion to invoke the remedy of Section 4. Such a remedy is necessary only in those cases where one party refuses to participate in the arbitration and a court order is necessary in order for the arbitration to proceed ex parte." *Standard Magnesium Corp. v. Fuchs,* 251 F. 2d 455 (Tenth Cir., Phillips, J.).

COURT STAYS ACTION FOR FRAUD IN CONTRACT INDUCEMENT WHERE NO VALID ISSUE HAS BEEN ALLEGED. Plaintiff brought suit for fraud relating to the performance of certain contracts and for fraud in the inducement of several others. The defendant, under a broad arbitration clause in the contracts, moved to stay the actions and to direct arbitration. The court said, with respect to the fraud in performance, "of this there can be no dispute that what occurred after the contract must be left to arbitration." The allegations of fraud in the inducement merely stated that the defendant had, without notice to plaintiff, changed the order form used in their transactions. The court, in holding that if no valid issue of fraud is alleged the issues must be arbitrated, said: "There is no allegation or statement of any fraudulent act other than the change in form of the order. Since no valid legal or factual issue involving the claimed fraud is presented, there is no impediment to arbitration." *Country Tweeds v. Einiger Mills,* N.Y.L.J., May 5, 1958, p. 6 (Aurelio, J.).

COURT WILL STAY ARBITRATION SOUGHT BY DISSOLVED CORPORATION UNDER CONTRACT ENTERED INTO PRIOR TO DISSOLUTION WHERE CORPORATE ASSETS WERE COMPLETELY DISTRIBUTED AMONG STOCKHOLDERS. Upon dissolution respondent corporation distributed its assets including the claim against petitioner to its stockholders. In reversing Special Term (digested in *Arb. J.* 1958, p. 52), which held the dissolved corporation to maintain identity under Sec. 29 of

the General Corporation Law for purposes of claims, the Appellate Division (First Dept.), said: "While this assertion (Sec. 29) is correct as a general statement, we cannot see its applicability here. If the contract had been retained by the corporation upon dissolution and the work thereunder had been completed by it, there might be some force to the contention. However, the dissolved corporation did not complete the contract, but rather conveyed it in some form as a distribution to certain individuals. . . . The demand for arbitration or for payment cannot be made by the corporate entity which no longer has an interest in the contract." *Milton L. Ehrlich, Inc. v. Unit Frame & Floor Corp.*, 5 A. D. 2d 272, 171 N.Y.S. 2d 502 (Frank, J.).

COURT STAYS ACTIONS TO FORECLOSE CONSTRUCTION LIENS PENDING ARBITRATION. Respondent proceeded to foreclose general construction liens against petitioner who sought arbitration as provided by contract. Respondent contended that the foreclosure proceeding was not "an action or proceeding" subject to a stay under the arbitration statute. The court held that "the procedure provided for by section 21-a, Lien Law, amounts to a 'proceeding' as defined in *Queens County Water v. O'Brien*, 131 App. Div. 91, 115 N.Y.S. 495; or a 'special proceeding' as defined by statute (sec. 5, Civil Practice Act; sec. 46-a, General Construction Law). De Lillo, by using the procedure provided by section 21-a, Lien Law, was seeking to enforce a right in a court." Proceedings were therefore stayed pending arbitration. *Lizza & Sons v. De Lillo Construction Co.*, 171 N.Y.S. 2d 768 (Hill, J.).

DELAY IN DEMANDING ARBITRATION DID NOT CONSTITUTE WAIVER WHERE DELAY WAS CAUSED BY RETENTION OF GOODS IN ORIGINAL PACKAGE AND WHERE FIRST COMPLAINT WAS MADE IMMEDIATELY AFTER PARTY WAS INFORMED MERCHANDISE WAS DEFECTIVE. Respondent sought to stay arbitration, commenced under provisions of a textile sales note, claiming that petitioner delayed nearly a year before demanding arbitration based upon defective merchandise. The court, in denying the stay, said: "Petitioner adequately explains the alleged time delay by the fact that the merchandise purchased by it was sold some time later . . . to another in the original package. The first complaint was made immediately after petitioner was informed . . . that the merchandise was defective. After petitioner's claim was rejected . . . demand for arbitration was made. It is my opinion that, as a matter of law, there is no such delay here as to justify a conclusion that there was a waiver of the right to arbitrate." *Gera Fabrics v. Liberty Fabrics of N.Y.*, N.Y.L.J., April 11, 1958, p. 5 (Matthew M. Levy, J.).

WHETHER RESTRICTIVE COVENANT OF TWO YEARS AFTER SEVERANCE VIOLATES PUBLIC POLICY IS A QUESTION FOR THE ARBITRATOR. Former employee sought a stay of arbitration claiming the covenant to be unlimited and hence contrary to public policy. The contract contained a broad arbitration clause covering "all disputes with respect to the terms and conditions of the agreement." In denying the motion the court

said: "The covenant is not void on its face, and in the light of the remaining provisions of the contract. Whether the contract is enforcible within the limits of public policy and respondent's necessities and whether petitioner requires any protection must be left to arbitration." *Lawson Associates v. Dunn,* N.Y.L.J., May 8, 1958, p. 6 (Aurelio, J).

ARBITRATION STAYED PENDING DETERMINATION BY TRIAL OF ALLEGATION THAT CONTRACT WAS A SHAM. On appeal from an order directing arbitration, it was alleged "that the parties intended the contract in question to be but a sham and made for the sole purpose of influencing a third party to purchase appellant's interest in a certain corporation." In staying the arbitration the Appellate Division (Second Dept.) said: "The factual questions concerning the enforcibility of the contract here in question cannot be determined upon the conflicting allegations and averments in the papers contained in the record (Civil Practice Act, Sec. 1450)." *Settineri v. Jacobs,* 5 A.D. 2d 885, 172 N.Y.S. 2d 620.

COURT WILL NOT STAY ARBITRATION DEMANDED UNDER ARBITRATION CLAUSE ON ALLEGATION OF ONE PARTY THAT CLAUSE WAS RESTRICTED BY LATER "ORAL AGREEMENT." Petitioner contended that an oral agreement between parties excepted the dispute upon which arbitration was instituted. Respondent denied such oral modification of the arbitration clause. In denying a stay of arbitration, the court said: "There is a contract, containing arbitration provisions, which petitioner seeks to interpret, as to the intent of the parties, to a holding that the matters in dispute are not arbitrable. Since the papers disclose that there is a dispute, that there is a contract to arbitrate and a refusal to arbitrate, the matters of fact and of law, and issues are all within the exclusive jurisdiction of the arbitrators." *Philip Rothman & Son v. Shinko Sangyo Trading Co.,* N.Y.L.J., April 4, 1958, p. 4 (Gavagan, J.).

AN OFFICER OF A RELIGIOUS CORPORATION CANNOT INSTITUTE ARBITRATION PROCEEDINGS WITHOUT AUTHORIZATION FROM THE BOARD OF TRUSTEES. Religious corporations entered into a contract of merger which provided for arbitration of all disputes. An officer of the respondent instituted arbitration of a dispute concerning certain actions of appellant's Board of Directors. Special Term had ordered arbitration and appointed an arbitrator although appellant had disputed the officer's authority. The Appellate Division, in reversing the lower court, distinguished this case from *Paloma Frocks v. Shamokin Sportswear,* 3 N.Y. 2d 572 (digested in *Arb. J.* 1958, p. 52), found that there was no evidence of the officer's authority to enforce arbitration and held that "respondent is a religious corporation, and its property is in the custody and control of its board of trustees (Religious Corporations Law, sec. 5). Neither its trustees nor its other officers have separate individual authority to bind the corporation. Collective action as a board is necessary." *Congregation Anshe Kesser v. Jewish Community Center of Corona, L. I., Inc.,* N.Y.L.J., April 29, 1958, p. 10 (App. Div., Second Dept.).

MOTION TO STAY ARBITRATION DENIED AS UNTIMELY WHEN MADE MORE THAN 10 DAYS AFTER SERVICE OF NOTICE PURSUANT TO SECTION 1458(2) C.P.A. Customer whose margin agreement with broker provided for arbitration of any controversy arising thereunder, sought a stay of arbitration which the court denied, saying: "The petitioner having failed to move for a stay within ten days after service of a notice of intention to arbitrate, is now estopped from seeking such relief." *Stone v. Bache & Co.*, N.Y.L.J., April 3, 1958, p. 5 (Gavagan, J.).

REASONABLENESS OF UNION'S DELAY BEFORE COMMENCING GRIEVANCE PROCEDURE INVOLVING JOB CLASSIFICATION IS A MATTER FOR THE ARBITRATOR. The employer, seeking to stay arbitration, claimed undue delay of several months by the union in processing its grievance. The arbitration clause required submission of grievances "within fifteen days after the Employer or Union knew of, or could reasonably have known of, the existence of the grievance." The union contended that 280 job classifications were involved and it required time to investigate each before reasonably determining the existence of a grievance. In denying the stay the court said: "Thus there is presented an issue of fact which is not for the court to decide (*Local Union 516, Inspection Unit v. Bell Aircraft Corp.*, 283 App. Div. 180, 127 N.Y.S. 2d 166, aff'd 307 N.Y. 744). 'The sufficiency and timeliness of the notices for arbitration are matters for the determination of the arbitrator' (*Application of W. S. Ponton, Inc.*, 101 N.Y.S. 2d 609)." *Ward Leonard Electric Co. v. Local 419, Electrical, Radio and Machine Workers, AFL-CIO*, N.Y.L.J., April 2, 1958, p. 13 (Gallagher, J.).

ALLEGED LACK OF PROMPTNESS IN UNION'S DEMAND FOR ARBITRATION OF LAYOFF GRIEVANCE HELD AN ISSUE FOR THE ARBITRATOR. Union and employer exhausted the steps of the grievance procedure on January 24, 1958 and union filed its demand for arbitration on February 13, 1958. "The petitioner contends that this was not a *prompt* request [as required by contract], and therefore arbitration is no longer available." Holding questions of timely notice to be for the arbitrator, the court said: "The grievance involved is clearly referable to arbitration under the . . . agreement, as is also the dispute with respect to the timeliness of the demand for arbitration as affecting a justification for petitioner's refusal to arbitrate (*Matter of Local Union 516* [*Bell Aircraft Corp.*], 283 App. Div. 180, aff'd 307 N.Y. 744)." The court therefore ordered arbitration to proceed. *Gruen-Simplex Corp. v. Local 463, International Union of Electrical, Radio and Machine Workers* (*AFL-CIO*), N.Y.L.J., March 25, 1958, p. 11 (Groat, J.).

DISTRICT COURT RULES THAT A CHALLENGE TO VALIDITY OF MUNICIPAL CONSTRUCTION CONTRACT REQUIRING ARBITRATION OF GRIEVANCES OF CONTRACTORS' EMPLOYEES DID NOT INVOLVE A FEDERAL QUESTION. In dismissing the complaint against the City of Philadelphia, the court held, in spite of fact that federal government funds, under a variety of statutes, were employed in municipal con-

struction, that question of validity of provisions of the construction contract between the city authorities and contractors was a purely local affair. The court referred to the reasoning in *Heller v. Kreider,* 98 F. 2d 106, where "the Court of Appeals held that the district court had no power to intervene in the purely local matter, not only as a matter of comity (since the matter was already in local litigation), but also because no federal question was involved." *Trauss v. City of Philadelphia,* 159 F. Supp. 672 (E. D. Penna., Lord, D. J.).

IN SUITS FOR SPECIFIC PERFORMANCE OF AGREEMENTS UNDER SEC. 301-a TAFT-HARTLEY ACT, DISTRICT COURT WILL APPLY FEDERAL LAW TO CONSTRUE ARBITRATION CLAUSE. Union sought specific enforcement of arbitration provision of collective bargaining agreements, whereas employer claimed that another agreement, namely, a pension agreement, covered the dispute, and that this agreement limited arbitration and specified that New York law was to be applied. The court quoted the *Lincoln Mills* opinion of the U. S. Supreme Court, which said: "The question then is, what is the substantive law to be applied in suits under Sec. 301(a)? We conclude that the substantive law to apply in suits under Sec. 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." The court then concluded that there is ample federal law construing the scope of arbitration clauses and that it is to these that the court turns in considering whether the specific grievance complained of is covered by the arbitration clause in the collective bargaining agreements. *Butte Miners' Union No. 1 of International Union of Mine, Mill and Smelter Workers v. Anaconda Co.,* 159 F. Supp. 431 (D. C. Montana, Murray, Ch. J.).

INDIVIDUAL EMPLOYEE, UPON REFUSAL OF UNION TO ACT, CANNOT ENFORCE ARBITRATION OF GRIEVANCE UNDER COLLECTIVE BARGAINING AGREEMENT. In denying a motion to compel arbitration, the court said: "Actually the union has shown that it has a very good reason for not proceeding to arbitration in this case, viz., that in a very similar case, which it finds is indistinguishable from petitioner's case, in which it did go to arbitration, it has recently received an adverse decision." As to employee's contention that he did not know of union's position, the court said: "It is clear in the papers that they will not [arbitrate] and further on the hearing the business agent of the union advised petitioner that the case would be taken from their arbitration calendar." *Grossman v. Republic Aviation Corp.,* N.Y.L.J., May 1, 1958, p. 13 (Christ, J.).

INDIVIDUAL EMPLOYEE CAN SUE EMPLOYER FOR BACK PAY DESPITE ARBITRATION CLAUSE IN COLLECTIVE BARGAINING AGREEMENT. The Seventh Circuit Court of Appeals affirmed an order enjoining the employer from arbitrating the claim. Employer argued that the collective bargaining agreement to which the employee's union was a party provided for arbitration and that Section 301 of the Labor Management Relations Act gives authority for specific performance. Said the court: "An employee has always had a right to bring suit in a court to recover wages

claimed to be owing him from his employer. . . . Such an action is based upon a hiring contract between the employer and the employee. While the contract between the employees' union and the employer may determine the rate of wages of the employee, the latter's right of action is not superseded by the employer-union agreement. An employee may enforce his claim for back wages by suing in a state court, or in a federal court where there is present diversity of citizenship and the required amount is involved." *Kosley v. Goldblatt Bros.*, 251 F. 2d 558 (Seventh Cir., Schnackenberg, C. J.).

UNION'S PERFORMANCE OF CONTRACT WHOSE EXISTENCE IS DISPUTED HELD SUFFICIENT TO ENFORCE ITS ARBITRATION CLAUSE. Employer seeking a stay contended that it did not agree to extend labor contract and that local operations covered by the alleged contract have been suspended. In denying a stay, the court said: "It clearly appears that the union acted under the extended agreement in several instances and respects, including the grant of additional benefits conferred by the extended agreement. Consequently there is no triable issue as to the existence of the contract as extended. The nature and character of the claimed discontinuance of the New York City operation as they affect the triable issue of breach of the contract are for the arbitrator." *Corset & Brassiere Workers Union v. Rivoli Corset Co.*, N.Y.L.J., April 3, 1958, p. 5 (Gavagan, J.).

IV. THE ARBITRATOR

ARBITRATION CLAUSE REFERRING TO "INDUSTRY ARBITRATION BOARD" IS TOO VAGUE TO BE ENFORCED. The court, in denying a motion to direct arbitration, said: "The provision for submission to an 'industry arbitration board' is indefinite and in the circumstances is incapable of fulfillment, no such board being available at all. The plaintiff may not be forced to an arbitration such as he did not agree to." *Miss Plaza Dress v. Shapiro*, N.Y.L.J., May 7, 1958, p. 7 (Rivers, J.).

COURT CONSTRUES CLAUSE REQUIRING BOARD CONSISTING OF BOTH PARTIES AND AN UMPIRE TO MEAN ARBITRATION BEFORE A SINGLE ARBITRATOR. A contract provided for a method of disposing of future disputes by a board consisting of "the parties, or their successors, and an umpire to be appointed by a Judge of the County Court of Queens County." Special Term considered such a board proper and valid (171 N.Y.S. 2d 555). The Appellate Division, however, held that "a party to a contract is ineligible to act as an arbitrator to decide disputes under it (*Matter of Cross & Brown Co.* [*Nelson*], 4 A.D. 2d 501; *Matter of Miller* [*Weiner*], 260 App. Div. 444)." Reasoning that "since the parties would in fact be expected to act as litigants rather than arbitrators, it must have been contemplated that the determination would actually be made by the umpire alone," the majority of the court modified the order of Special Term in ordering arbitration before a single arbitrator. Two dissenting judges voted for the appointment of substitutes for the two arbitrators designated in the contract.

"The agreement between the parties provided for three arbitrators. Two having been determined to be disqualified, others should be appointed in their places (*Matter of Lipschutz* [*Gutwirth*], 304 N.Y. 58)." *Pisciotta v. Newspaper Enterprises,* N.Y.L.J., April 29, 1958, p. 10 (App. Div., Second Dept.).

COURT WILL APPOINT ARBITRATOR WHERE THERE HAS BEEN AN UNREASONABLE DELAY IN FILLING VACANCY. While proceedings before a three-man board were in progress, respondent's party-appointed arbitrator resigned. Petitioner requested the court to fill the vacancy. Said the court: "The record here indicates that there has been an unnecessary and unreasonable lapse of time on the part of the respondent in nominating an arbitrator to fill the vacancy created by the resignation . . . In such circumstances, I am satisfied that equitable principles and the interests of justice will best be served by the appointment of an arbitrator by this court." The court held respondent not to be prejudiced by the fact that petitioner's arbitrator was party-appointed whereas his was now court-appointed since Sec. 1455 C.P.A. binds all arbitrators to their oath. *Linwood v. Sherry,* 171 N.Y.S. 2d 941 (Pette, J.).

V. THE PROCEEDINGS

PARTICIPATION IN ARBITRATION HEARING ON MERITS CONSTITUTES WAIVER OF OBJECTIONS TO JURISDICTION. In a New York arbitration a Massachusetts defendant appeared at the hearing with counsel who raised jurisdictional objections to which the arbitrator reserved decision. When counsel sought to participate in hearing on the merits he was warned by the arbitrator that this would be deemed a waiver of jurisdictional objections. Nevertheless, the counsel participated "to some extent" on the merits. In giving recognition to a New York judgment based upon the award, the Supreme Judicial Court said: "The arbitrator correctly stated the New York law in advising the defendants' counsel that participation in the hearing on the merits, such as by cross-examining witnesses, would be a waiver of any objections to jurisdiction. *Harris v. East India Trading Co., Inc.,* 144 N.Y.S. 2d 894, 897-898 (Sup. Ct.). The defendant's subsequent participation would be a sufficient ground upon which to rest our decision." *Samincorp South American Minerals and Merchandise Corp. v. Reubin Lewis et al.,* No. 11,988, Suffolk County, 1958, Supreme Judicial Court, Mass.

REFERENCE TO AAA RULES HELD CONSENT TO HAVE PLACE OF ARBITRATION DESIGNATED IN ACCORDANCE WITH THOSE RULES. As a defense to an action to enforce a New York judgment on an award in Massachusetts, the Supreme Judicial Court said: "The contention is made that the contracts do not provide for arbitration in New York and hence the defendants have not submitted to the jurisdiction of the New York courts in accordance with art. 84, Sec. 1450, of the Civil Practice Act. By its rules, which are by reference made part of the contracts, the [American

Arbitration] Association had the power to fix the place of arbitration. The Association exercised the power. As was said in a similar case, 'The contract between the parties, while providing for arbitration, does not fix the place thereof. The rules of the American Arbitration Association are by reference made a part of the contract. Under these rules the Association has the power to fix the place of arbitration. In this case the power was exercised. It can be thus said that the parties contracted to fix the place of arbitration in New York.' *Matter of Bradford Woolen Corp.* (*Freedman*), 189 Misc. (N.Y.) 242, 244. See *Application of L. N. Jackson & Co., Inc.*, 106 N.Y.S. 2d 725, 726." *Samincorp South American Minerals and Merchandise Corp. v. Reubin Lewis et al.*, no. 11, 988, Suffolk County, 1958, Supreme Judicial Court, Mass. (Wilkins, C. J.).

SERVICE OF NOTICE OF MOTION TO STAY ARBITRATION UPON UNION'S ATTORNEY WITHIN TEN-DAY PERIOD PURSUANT TO SEC. 1458(2) C.P.A. DEEMED PROPER AND TIMELY. Said the court: "A motion for a stay does not constitute the institution of a new special proceeding, but is a motion in an already existing special proceeding (*Grand Central Theatre, Inc. v. Moving Picture Machine Operators Union*, 69 N.Y.S. 2d 115, aff'd 263 App. Div. 989, 34 N.Y.S. 2d 400) . . . The permissible manner of serving motion papers in an already existing action or proceeding is upon the attorney for the opposing party (Rule 20, Rules of Civil Practice). Therefore, service upon the union's attorney within the ten-day period limited by the statute was good and timely service. (*Application of Katz*, 1 Misc. 2d 67, 146 N.Y.S. 2d 332)." *Ward Leonard Electric Co. v. Local 419, International Union of Electrical, Radio and Machine Workers, AFL-CIO*, N.Y.L.J., April 2, 1958, p. 13 (Gallagher, J.).

ON MOTION TO CONFIRM AWARD COURT WILL NOT ENTERTAIN CLAIM OF PARTICIPANT IN ARBITRATION PROCEEDINGS THAT IT WAS NOT A PARTY TO THE ARBITRATION CONTRACT. Respondent claimed that a corporation rather than respondent personally was party to the contract providing for arbitration. Said the court: "In the circumstances of this case, it is too late to present that issue. The petitioners' demand for arbitration complied with section 1458(2) of the Civil Practice Act, and no contest was tendered by respondent prior to the arbitration proceedings. Participation by respondent in the proceedings before the arbitrator effectuated a waiver by respondent of any claim of absence of contract between the parties (*Harris v. East India Trading Co., Inc.*, 144 N.Y.S. 2d 894, 898). Moreover, the contract does not disclose, as respondent contends, that a corporation—as distinguished from respondent personally—was necessarily the contracting party." *Roscoe v. Simon*, N.Y.L.J., April 21, 1958, p. 7 (Matthew M. Levy, J.).

VI. THE AWARD

COURT CONFIRMS AWARD IN EXCESS OF LIQUIDATED DAMAGES. The Appellate Division (First Dept.) modifying an order of Special Term which had vacated the award, said: "The arbitrators did not exceed their powers in awarding damages to appellant since its claims were not restricted to a demand for damages for delay. Since the award to appellant could have included these other items of damage, there was no legal basis for vacating it because of the provision of the contract regarding $25 a day as liquidated damages for delay. *Deering Milliken & Co. v. Boepple Sportswear Mills, Inc.*, 4 A.D. 2d 652, 168 N.Y.S. 2d 760." (For preliminary phases of this case, see *Arb. J.* 1957, pp. 48, 118, 120). *Brown-Turner, Inc. v. Complete Machinery & Equipment Co.*, 5 A.D. 2d 817, 170 N.Y.S. 2d 689.

COURT HOLDS EX PARTE AWARD UNENFORCEABLE WHEN PARTICIPATION OF BOTH PARTIES WAS CONSIDERED BY CONTRACT. The collective bargaining agreement provided for two party-appointed arbitrators, and in the event these arbitrators failed to agree, a third arbitrator would be chosen from a list prepared by the Federal Mediation and Conciliation Service. The union instituted arbitration of a dispute over union dues and job posting but the employer, contesting the arbitrability of these issues, refused to participate and challenged an award by the board as not selected in the manner provided in the agreement. The court stated as its opinion "that the plaintiff [union] should have followed the procedure outlined by the Supreme Court in *Textile Workers Union of America v. Lincoln Mills of Alabama*. The provision in the contract for arbitration contains no provision for an ex parte arbitration, and, upon the refusal of the defendant to enter into the arbitration, the remedy of the plaintiff was that provided in Section 301 of the Labor Management Relations Act as construed in the *Lincoln Mills* case." The Court, in dismissing the motion to enforce the award, gave the union leave to commence an action for specific performance of the contract under Sec. 301, LMRA. *Food Handlers Local 425, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Pluss Poultry, Inc.*, 158 F. Supp. 650 (D.C. W.D. Arkansas, Miller, J.).

COURT CORRECTS AWARD ALLOCATING ADMINISTRATIVE EXPENSES IN A MANNER DIFFERENT FROM THAT PRESCRIBED BY CONTRACT. Said the court: "In view of the contractual provision that 'each of the parties shall pay one-half of the expenses of arbitration', the arbitrators had no power to apportion the expenses in any other manner. However, since the quantum of the expenses is fixed and undisputed, the Court can correct the award to conform to the agreement in that regard without the necessity for remitting the matter to the arbitrators for that purpose." *Brown-Turner, Inc. v. Complete Machinery & Equipment Co.*, 5 A.D. 2d 817, 170 N.Y.S. 2d 689.

PARTY CANNOT EVADE ENFORCEMENT OF AWARD SOLELY BY CHANGING CORPORATE NAME DURING HEARING. Respondent refused to attend the final hearing, notified the arbitrator that its corporate

name had been changed, and contended that such change is a defense to a motion to confirm the award. The court, in dismissing respondent's contentions, found that both respondent and successor corporations shared the same president, customers, address and telephone number, and said: "It is clear that both corporations are one and the same." *Minkoff v. H. & L. Drew Corp.*, 171 N.Y.S. 2d 900 (Klein, J.).

COURT VACATES AWARD WHICH MERELY REITERATED PARTIES' RIGHT TO HAVE DISPUTE DETERMINED. Under a collective bargaining agreement disputes were referred to the union and employers' association for joint investigation and adjustment. In the event that further determination was required the matter was referred to a Conference Committee. The award stated that there was a dispute as to general contracting and purchasing from establishments not in contractual relations with the union, and that "A joint investigation is directed to take place forthwith." Said the court: "The award does nothing but confirm the right of the parties under . . . the agreement. There has been no determination of the charges against the respondent which can be confirmed. After the joint investigation and the making of a definite award, the motion to confirm such award can be made." *Jasper v. Harry Rothstein Bros.*, N.Y.L.J., April 16, 1958, p. 6 (Capozzoli, J.).

FEDERAL ARBITRATION ACT HELD INAPPLICABLE TO ENFORCE AWARD BASED ON A "LOCAL" TRANSACTION. The District Court, D. Columbia, stating that the Federal Arbitration Act "applies only to the types of arbitration which are defined in Sections 1 and 2, namely arbitration arising out of maritime transactions, out of interstate or foreign commerce, or out of commerce in the District of Columbia," held that the Act does not apply to a "local transaction taking place in Maryland." The court therefore dismissed a motion to enforce an award under the summary procedure of Sec. 9 of the Act. *Ford v. Lambros*, Misc. 29-57, D.C. Dist. Col. (Holtzoff, J.).